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Supreme Court, U.S.
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NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

HOWARD MATTHESON,
Petitioner

VERSUS

STATE OF LOUISIANA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF LOUISIANA

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March 26, 1982

QUESTIONS PRESENTED FOR REVIEW

I. Whether the admission into evidence of petitioner's three prior pleas to armed robbery charges without evidence those pleas were counselled drained the sentencing hearing of every vestige of due process.

II. Whether the denial of use immunity to compel Willene Mattheson's testimony at the sentencing phase deprived petitioner of his sixth amendment right to compulsory process and his fourteenth amendment right to due process.

III. Whether a sentence of death is unconstitutionally arbitrary when the record does not support each of the aggravating circumstances found by the jury.

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

HOWARD MATTHESON, Petitioner

vs.

STATE OF LOUISIANA, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF LOUISIANA

The petitioner, Howard Mattheson, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Louisiana entered in this proceeding on November 16, 1981.

OPINION BELOW

The opinion of the Louisiana Supreme Court in State v. Mattheson, 407 So.2d 1150 (La. 1981) appears in the appendix hereto.

JURISDICTION

The judgment of the Supreme Court of Louisiana was entered on November 16, 1981. A timely petition for rehearing was denied on January 25, 1982. This petition is being filed within sixty days of the denial of the rehearing. The Court's jurisdiction is therefore invoked under 28 U.S.C.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOKED

This case involves the Sixth Amendment, Fourteenth Amendment, Louisiana Revised Statutes 14:30 and 14:30.1, Louisiana Code of Criminal Procedure articles 905.4 and 905.7, and Louisiana Supreme

Court Rule 28. The full text of each is included in the appendix.

STATEMENT OF THE CASE

An Orleans Parish Grand Jury indicted Howard and Willene Mattheson for the March 9, 1978, first degree murder of one Maime Dupacquier. On May 31, 1978, the case came to trial; at this time the state elected to sever the trial of petitioner from that of his wife. The charges against petitioner's wife were subsequently dismissed. A two-day trial ensued, at the conclusion of which the defendant was found guilty as charged. After the sentencing hearing required by law, the jurors unanimously recommended infliction of the death penalty.

Testimony at the trial established that the petitioner and his wife had come to New Orleans from Florida, and were living in a boardinghouse some two blocks from the scene of the homicide. On March 9, 1978, at approximately 4:30 P.M., the petitioner and his wife entered the beauty salon where the victim worked. Almost immediately either one or two shots were fired from a double-barrelled (and double-triggered) shotgun carried by the petitioner. The blast hit the receptionist, Mamie Dupacquier, in the head, tearing away most of the skull and brain and resulting in her death. Only two witnesses were able to testify for the state as to the exact sequence of events before Ms. Dupacquier's death. The majority of the witnesses were, however, able to relate that immediately following a large noise, they saw the petitioner and his wife bound up the few stairs to the main level of the shop, the defendant with a sawed-off shotgun and his wife carrying some sort of pistol. Petitioner yelled for everyone to get on the floor, for everyone to follow his orders as he had killed once and could kill again. The pair proceeded to search the handbags of all the women present in the store, and ordered the store's one male employee to use tape which they had brought to bind everyone. Sometime during this process, one woman refused to surrender her purse, and told petitioner that he would have to kill her first. The petitioner's alleged reply was that he would not shoot her,

but that he would shoot the person next to her, who happened to be Ms. Laura McGooey. Ms. McGooey was shot in the leg at point-blank range.

Petitioner took the stand and testified that he had planned and committed the armed robberies, but had never meant to kill the receptionist. He testified that he was both drunk and under the influence of LSD at the time of the robberies. As the issue was clearly phrased in terms of intent, the petitioner tried to call his wife, a severed co-defendant, to the stand. She answered preliminary questions, but then asserted her Fifth Amendment privilege, refusing to answer any questions about March 9, 1973.

The state rebutted the defendant's claim of accident (which would then make the crime a felony-murder, or second-degree murder under Louisiana law and requiring imposition of a sentence of life at hard labor) by calling to the stand a child who claimed that the receptionist had made no move to startle the defendant before the shot was fired. The state also proved that petitioner had visited the beauty salon a week before the crime, and at the time of the crime had carried with him enough shotgun shells to kill everyone in the place. Fortunately, the state claimed, more people were in the salon than on the petitioner's previous visit, forcing him to abandon his plan to kill everyone within.

The jury took approximately two and a quarter hours to find petitioner guilty as charged. Pursuant to Louisiana law, the trial then shifted to a penalty phase. As previously announced, the state relied on three aggravating circumstances in seeking a death penalty: that the homicide occurred in the course of an armed robbery, that the homicide involved a risk of death or great bodily harm to more than one person, and that the homicide was especially cruel, atrocious, or heinous. In this penalty phase the state introduced evidence that the defendant had pled guilty three times before to the crime of armed robbery. This evidence, not even relevant to any statutory aggravating factor, was introduced over the defendant's protests that the state's

certified copies of the minutes of the prior pleas did not affirmatively show that the petitioner had ever been represented by counsel. After one hour and twenty minutes of deliberation, the jury returned a recommendation of death, having found the presence of all three aggravating circumstances urged by the state. As he was bound to do by the jury's verdict, the trial judge sentenced Howard Mattheson to die in the electric chair.

The Louisiana Supreme Court rejected the defendant's challenges to his conviction and sentence. The sentence was affirmed by the Court under its own rules after it found justification for the jury's finding that the petitioner had been engaged in an armed robbery at the time of the homicide. The Louisiana Supreme Court, as it had sometimes done in other cases, declared that it was under no duty to review the evidence to see if the other aggravating circumstances found by the jury were indeed proven beyond a reasonable doubt.

On February 2, 1982, following the denial of a rehearing, the Louisiana Supreme Court granted a stay of execution pending this Court's determination of the petition for a writ of certiorari. (See Appendix C.)

ARGUMENT

I.

WHETHER THE ADMISSION INTO EVIDENCE OF PETITIONER'S THREE PRIOR PLEAS TO ARMED ROBBERY CHARGES WITHOUT EVIDENCE THOSE PLEAS WERE COUNSELLED DRAINED THE SENTENCING HEARING OF EVERY VESTIGE OF DUE PROCESS.

The Sixth Amendment guarantees to the accused the right to the assistance of counsel in every criminal prosecution. In Gideon v. Wainwright, 372 U.S. 335 (1963), this Court held that the uncertainty inherent in a felony trial without representation for the accused mandated the reversal of any conviction. In the case at bar petitioner suffered from a lack of counsel not only each of the three previous times he had pled guilty to armed robbery charges without benefit of the advise of counsel, but again

when these convictions were presented to a jury which then chose to exact the ultimate penalty.

The state had announced that it intended to rely on three aggravating factors in asking the jury to return a death penalty: that the homicide occurred in the course of an armed robbery, that the homicide involved a risk of death or great bodily harm to more than one person, and that the homicide was especially cruel, atrocious, or heinous. La. C.Cr.P. art. 905.4(a), (d), and (g). Not until after the offense involved in this case and the petitioner's trial was the Louisiana statute amended to include as an aggravating circumstance that the offender has "a significant prior history of criminal activity". (See Louisiana Acts of 1979, No. 74.) In any event, the state decided to anticipatorily rebut any claim the defendant might make that he had no significant prior history of criminal activity, and so sought to introduce evidence of three prior convictions.

The first plea brought before the jury was a plea to a charge of aggravated assault and armed robbery with violence, from February 21, 1958. The second was a plea of guilty to armed robbery, and the third was a plea of guilty to yet another armed robbery, this last from March of 1967. Petitioner's counsel objected to the use of these certified convictions (state's exhibits 63-A, 64-A, and 65-A) on the grounds that none of the minutes showed either the presence of counsel or a valid waiver of the right to counsel. The objection was overruled, though on appeal the Supreme Court of Louisiana noted that the state had made no showing that petitioner had been granted his Sixth Amendment rights for any of the prior pleas. State v. Mattheson, 407 So.2d 1150, 1167 (La. 1981).

This Court has issued a consistent line of cases disapproving of the use of uncounselled convictions. The Court has held that any record reflecting neither the presence of counsel nor a valid waiver of the Sixth Amendment right raises a presumption that the defendant was denied his right to counsel, and that the conviction is therefore void. Burgett v. Texas, 389 U.S. 109, 114-15

(1967). In United States v. Tucker, 404 U.S. 443 (1972), the respondent had been convicted of bank robbery in federal court, and in sentencing him to a term of twenty-five years (the maximum authorized by statute) the trial judge had considered three prior felony convictions. Two of those prior convictions were later determined to have been constitutionally invalid, as having resulted in proceedings where Tucker neither had been "advised of his right to legal assistance" nor had he waived his right. The Court of Appeals considered the evidence against Tucker and decided that admission of the constitutionally invalid convictions had been harmless beyond a reasonable doubt in the consideration of his guilt or innocence of the bank robbery. The Ninth Circuit however felt that there was a "reasonable probability" that the defective convictions may have led to the imposition of a heavier sentence, and therefore remanded the case for resentencing. This Court affirmed the ruling of the Court of Appeals, despite the government's argument that a trial judge may consider a broad range of evidence in fashioning an appropriate sentence:

> we deal here, not with a sentence imposed in the informed discretion of a trial judge, but with a sentence founded at least in part upon misinformation of constitutional magnitude. As in Townsend v. Burke, 334 U.S. 736, "this prisoner was sentenced on the basis of assumptions concerning his criminal record which were materially untrue." Id., at 741.

Tucker, 404 U.S. at 447.

The Court again considered the use of uncounselled convictions for sentencing purposes in Baldasar v. Illinois, 446 U.S. 222 (1980). Thomas Baldasar had been convicted in 1975 of misdemeanor theft. The record reflected neither the presence of counsel nor a waiver of that right. Under Illinois law, that charge could carry no more than a year in prison and a one thousand dollar fine. A second conviction, however, could be treated as a felony with a prison term of one to three years. Later in 1975, Thomas Baldasar was once again arrested and charged as a second offender, i.e. a felon. Defense counsel argued unsuccessfully that the first uncounselled conviction was by that very fact so

unreliable as to preclude operation of the second offender provision. The Illinois appellate courts rejected this contention, claiming that Baldasar "was sentenced to imprisonment for his second theft conviction only and not, as he suggests, sentenced again, and this time to imprisonment, for the first theft conviction."

In a brief per curiam opinion, this Court reversed. Several concurring opinions were filed. Justice Blackmun concurred, asserting simply that he would require counsel whenever a person is trief for an offense punishable by more than six months' imprisonment (cf. Scott v. Illinois, 440 U.S. 367 (1979)), and then made the logical jump that enhancement upon such an uncounseled conviction is not to be permitted. Justice Marshall, joined by Justices Brennan and Stevens, asserted that the defendant's conviction could not be used for enhancement proceedings, but that the conviction was valid for some purposes. Justice Stewart, joined by Justices Brennan and Stevens, based his concurrence upon Scott v. Illinois, requiring counsel when imprisonment is actually imposed, and noted especially that in its brief in Scott, the state requested that the Court not impose a mandatory counsel rule, arguing that its prosecutors knew full well that when they failed to request appointment of counsel, any conviction could not be used subsequently to enhance punishment.

Though the term seems quite inappropriate, there can be no doubt that the death penalty is an "enhancement", or of much greater severity, than life imprisonment. The prosecutor's argument in the sentencing phase leaves no doubt that the state exacted considerable leverage from the admission of the uncounselled convictions:

> Also, Mr. Merritt (defense counsel) wants to talk about sentencing him to just life imprisonment. Well, you saw these documents, State's Exhibit 65-A: "The sentence that is further considered, ordered, and judged is that you be imprisoned by confinement at hard labor in the State penitentiary for a term of the remainder of your natural life." This is dated May 11, 1967. That's eleven years and about twenty days, twenty-one days

ago, from today. He was given life once.

(Tr. at 570.)

If in Tucker and Baldasar uncounselled convictions or pleas were so inherently unreliable as to make their use in sentencing to a term of years an unconstitutional practice, it is unfathomable that the use of such convictions in sentencing a man to death could be tolerated. Not only did the defendant suffer thrice before for the lack of counsel, but he has now been called upon to pay with his life for the system's shortcomings. The use of three separate unconstitutionally obtained armed robbery convictions cannot be harmless error, and their use therefore mandates vacating the death penalty in this case.[1]

II.

WHETHER THE DENIAL OF USE IMMUNITY TO COMPEL WILLENE MATTHESON'S TESTIMONY AT THE SENTENCING PHASE DEPRIVED PETITIONER OF HIS SIXTH AMENDMENT RIGHT TO COMPULSORY PROCESS AND HIS FOURTEENTH AMENDMENT RIGHT TO COMPULSORY PROCESS.

Far more so than in an ordinary criminal trial, the objective of a penalty phase hearing should be certainty, a certainty that the defendant is guilty of the murder, and that he is in some way distinguished from other murderers, for some particular reason deserves to die. In the case at bar, the state had to prove (for a first degree murder conviction) that the petitioner had committed a specific intent homicide in the presence of one or more of the aggravating circumstances enumerated in La. C.Cr.P. art. 905.4. Two theories of defense were developed at trial. First was the defendant's claim that he had been so intoxicated and drugged that he had not the mental capacity to form a specific intent. Second was the petitioner's testimony that he had not meant to pull the trigger, but that the victim had reached for the

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1. The Louisiana Supreme Court held first that the state had no affirmative burden to show the presence of counsel or a waiver thereof before introducing the convictions. In the alternative, the Court held that any error was harmless: three improperly admitted armed robbery convictions carried no more weight in the jury's decision than did the defendant's previous admissions that he was carrying an illegal weapon, had taken drugs, and had violated his Florida parole by leaving that state.

gun and it had somehow discharged. The petitioner attemp ed to establish his defense with the testimony of the only live witness in the immediate vicinity of the shooting other than himself, namely, his wife Willene Mattheson. However, Mrs. Mattheson also stood charged with the crime of first degree murder, but her trial had been severed from petitioner's immediately prior to the commencement of petitioner's trial. When called to the stand, Mrs. Mattheson chose to invoke her Fifth Amendment privilege. Though Mrs. Mattheson's counsel took the stand and testified that his client was in possession of information exculpatory as to any intent to kill during the armed robbery, the trial judge denied a defense request that Willene Mattheson be granted use immunity for her testimony and forced to testify. The trial judge reasoned that Louisiana law provided for use immunity only upon the prosecutor's application to the attorney general, and thus if the prosecutor did not wish to seek a grant of use immunity for Willene Mattheson, he, the trial judge, was powerless.

The question arose again during the penalty phase of the trial. At this point, however, the judge offered a limited use immunity to Willene Mattheson, but refused to compel her testimony. At the close of the penalty phase, only the defendant's testimony supported his claim of intoxication from drugs and alcohol, and his claim that he had never planned to kill. The assertion by Willene Mattheson's attorney that she had exculpatory evidence went unexpolored because the prosecutor was naturally unwilling to seek use immunity for her.

In Kastigar v. United States, 406 U.S. 441 (1972), this Court held that a witness could be compelled to answer questions under a grant of use rather than transactional immunity, as the use immunity was co-extensive with the privilege surrendered. The only question left for the jury in this trial was whether the defendant had the specific intent to kill or cause great bodily harm. The testimony of petitioner's wife was critical, and the state deprived him of such testimony.

While the courts may disapprove of fashioning judicial

authority to grant use immunity in the ordinary criminal trial, it is far worse to deprive a defendant of his Sixth Amendment right to compel the attendance of witnesses and his Fourteenth Amendment right to due process when the defendant's life is at stake. A defendant's right to compulsory process is an empty one if a witness is permitted to invoke the protection of the Fifth Amendment and refuse to testify. A judicially-fashioned use immunity could have protected the rights of all parties concerned. Petitioner could actually have taken advantage of his constitutional rights. A sealing of a copy of the state's file would have made possible later review to insure that Willene Mattheson's testimony would not be used against her, either directly or to derive further evidence. The state would not have been prejudiced because it claimed to be ready to try Willene Mattheson, and therefore had no need to search for further evidence.

The failure to compel Willene Mattheson's testimony requires a remand with directions to grant her use immunity and compel her testimony under penalty of contempt.

III.

WHETHER A SENTENCE OF DEATH IS UNCONSTITUTIONALLY ARBITRARY WHEN THE RECORD DOES NOT SUPPORT EACH OF THE AGGRAVATING CIRCUMSTANCES FOUND BY THE JURY.

The thrust of every death penalty case in the 1970s was to fashion procedures whereby the defendant, the judicial system, and the public could be assured that the jury's verdict had been guided by law and no death sentence the result of an arbitrary or capricious act. Cf. Gregg v. Georgia, 428 U.S. 153 (1976); Godfrey v. Georgia, 446 U.S. 420 (1980). To allow the death penalty to be imposed where the jury erroneously returns at least one of those aggravating circumstances necessary for the imposition of the death penalty would be to void all the work previously done in this field, and to again allow the jury untrammelled discretion.

It will be remembered that the state urged imposition of the death penalty on the basis of three statutory aggravating circumstances: that the homicide was committed in the course of an armed robbery, that the homicide created a risk of death or great bodily harm to more than one person, and that the homicide was committed in an extremely cruel, atrocious, or heinous manner. The jury had to find that the state proved at least one of these aggravating circumstances before it would be allowed to even consider imposition of the death penalty. Louisiana law requires that with a recommendation of death the jury must specify which aggravating circumstances it relied upon. When the jury returned in the case at bar, it indicated that it had found each of the aggravating circumstances urged by the prosecution. On appeal, petitioner's counsel argued that there was no evidence that the manner in which Maime Dupacquier was killed was excessively cruel, atrocious, or heinous. The Louisiana Supreme Court affirmed defendant's conviction, noting as it had on several occasions previously, that state law and its own rule[2] required no stricter review than the determination that one of the aggravating circumstances found by the jury was indeed present. The Louisiana Supreme Court's inquiry therefore ended with the finding that the petitioner had been involved in an armed robbery when the homicide was committed.

Resolving petitioner's contention that the jury's action was arbitrary and unguided requires a two-part analysis: (1) whether the killing was excessively cruel, atrocious, or heinous, and (2) whether the unjustified finding of an aggravating circumstance demands a new sentencing hearing.

Accepting the state's evidence as true, it appears that Maime Dupacquier was killed by two simultaneous blasts from a double-barrelled shotgun fired at close range. There was no long confrontation, but the victim was killed as soon as the petitioner and his wife entered the door of the beauty salon. The

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2. See La. S.Ct. rule 28, contained in Appendix A.

prosecutor argued to the jury that what made the crime heinous was the fact that the victim's blood was spilt throughout the store's entrance, that her scalp was ripped off. (Tr. at 557-58.)

The Louisiana Supreme Court has adopted Georgia's interpretation of article 905.4(g), requiring the conscienceless or pitiless torture of the victim. State v. Monroe, 397 So.2d 1253 (La. 1981); State v. Sonnier, 379 So.2d 1336 (La. 1980); State v. English, 367 So.2d 815 (La. 1979). In the case at bar, the record reflects that this limiting construction of the aggravating circumstance was not conveyed to the jury. The killing in this case took but seconds, and the victim immediately lapsed into unconsciousness. It is submitted that there was cruelty, the cruelty inherent in every killing, but no excessive cruelty in this case. The victim, by all accounts, knew not what was going to happen to her, and she did not suffer after the shots. This case is threfore unlike Sonnier, in which there were two victims, a boy and a girl. The girl was raped in front of her boyfriend, then both agonized as they were forced to lay down in a field with a gun at their heads. In Sonnier, the victims were not killed instantaneously, but rather were psychologically tortured before their deaths. The case at bar is more like State v. Culberth, 390 So.2d 847 (La. 1980). In Culberth the victim was stabbed repeatedly in a public place, while two onlookers were kept from aiding her by threats from the defendant. The Louisiana Court held that the record did not

> support the finding that the offense was committed in an especially heinous, atrocious or cruel manner. Obviously, it was not in-tended that all murders fall in this category, even though it can be said that murder itself is a heinous, atrocious and cruel crime. We have stated that the concept of heinousness must necessarily include "some idea of torture or the pitiless infliction of unnecessary pain on the victim." State v. English, supra, at 823. Such a construction is necessary to protect the statute on grounds of vagueness and overbreadth and to provide adequate guidelines for those involved in the sentencing process. Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976). In this case the defendant did not torture or abuse the

> victim before her death. The wounds were inflicted to kill, not to main or to inflict pain.

In fact, the state argued in this case that the defendant meant to kill the vitim immediately to indicate to the other customers of the beauty salon that he meant business. Certainly, there was no torture to the victim in this case.

The analysis used in State v. Monroe, 397 So.2d 1258 (La. 1981) makes it clear that the state construction of the statute does not permit a finding of excessive cruelty based on acts which occur after the killing of the victim. In Monroe the defendant was convicted of first degree murder and sentenced to death for the killing of his next-door neighbor. The defendant had allegedly stabbed the victim repeatedly, and then run after the victim's daughter, stabbing her and inflicting wounds severe enough to keep her hospitalized for several weeks. The Louisiana Supreme Court found that the jury had improperly returned the aggravating circumstance of excessive cruely or atrociousness. The Louisiana Court's failure to consider the stabbing of the victim's daughter after the victim herself had been stabbed indicates that a continuing course of conduct involving someone other than the victim cannot constitute conduct falling within the scope of La. C.Cr.P. art. 905.4(g). Presumably, then, had the state court considered the jury's finding of 905.4(g) in petitioner's case, it would have discovered insufficient record evidence for the return of this aggravating circumstance. The victim was not tortured before her death, and the shooting of Laura McGooey does not fall within the gambit of 905.4(g).

The question remains, however, as to whether the death penalty can stand when one of the bases is removed. A similar question is presently before the Court in Zant v. Stephens, No. 81-89. Stephens was sentenced to death by a Georgia jury which found three aggravating circumstances. Although one of the circumstances (a "significant history of prior criminal activity") was declared unconstitutionally vague after Stephens' conviction, the Georgia Supreme Court nonetheless affirmed because the evidence

the jury's finding of the other aggravating circumstances. Failing to obtain relief in the Georgia state courts, Stepehns turned to federal habeas remedies. Eventually, the Court of Appeals for the Fifth Circuit reversed, holding that the reliability of the jury's verdict was impaired by the erroneous return of an aggravating circumstance which did not exist, or which was unconstitutional. The Fifth Circuit did so despite urging from the state that established procedure would have allowed evidence of the prior convictions even if not relevant to proving one of the statutory aggravating circumstances. This Court has accepted review of the decision in Stephens v. Zant, 631 F.2d 397 (5th Cir. 1980).[3]

The rationale used in Stephens, and applicable here, is that while the finding of an aggravating circumstance is a prerequisite for the consideration of the death penalty, the finding of that aggravating circumstance does not require imposition of the death penalty. Insofar as any appellate court may determine, it is equally likely that the jury would not have imposed the death penalty had it realized that only two, rather than three, aggravating circumstances were present. In Stromberg v. California, 283 U.S. 359 (1931), this Court held that a criminal conviction must be reversed if the jury could have based the verdict on an unconstitutional statutory ground, even though there were other valid statutory grounds which the jury in fact may have employed.[4] If an ordinary criminal conviction may be set aside on these grounds, the unconstitutional application of a statutory ground will surely demand reversal of a death penalty. In the analogous case of Henry v. Wainwright, ___ F.2d ___ (5th Cir. 1981), the Fifth Circuit held that

> "our task is not restricted to an effort to divine what motives impelled (this)

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3. It is important to realize that the first argument in this petition is in now way controlled by the outcome of Zant. In Zant, evidence of the convictions was independently admissible. The argument in the first part of this petition is that the uncounselled convictions should at no time have been admitted into evidence. They should never have been considered by the jury, statutory aggravating circumstance or not.

4. Stromberg should not be distinguished because it dealt with an unconstitutional statutory ground, whereas the case at bar deals with the unconstitutional application of a statutory ground.

> death penalt(y). Rather, we deal with a system of law and justice that leaves to the uncontrolled discretion of judges and juries the determination whether defendants committing these crimes shall die or be imprisoned." Furman v. Georgia, 408 U.S. 238, 253, 92 S.Ct. 2726, 2734, 33 L.Ed.2d 346 (Douglas, J., concurring). Guarding against the arbitrary and discriminatory imposition of the death penalty must not become simply a guessing game played by a reviewing court in which it tries to discern whether the improper nonstatutory aggravating factors exerted a decisive influence on the sentence determination. The guarantee against cruel and unusual punishment demands more.

The return of an unsupported aggravating factor may have tipped the scales in favor of death. Certainly no one can argue that a jury finding four, or five, or six aggravating factors is not more likely to return a death penalty that a jury finding only one or two aggravating factors. The courts should not play a "guessing game". The uncertainty in this verdict requires vacating the death sentence.

CONCLUSION

Petitioner was clearly deprived of a sentencing hearing designed to guide the jury's discretion in their consideration of evidence and determination of punishment. Uncounselled convictions for serious crimes were put before the jury, a key witness was allowed not to testify despite her indications that the testimony was clearly exculpatory, and a vague aggravating circumstance was erroneously relied upon by the jury for the return of a death penalty. Petitioner now seeks a determination by this Court that he is entitled to a fair sentencing hearing.

Respectfully submitted,

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APPENDIX A

Amendment VI of the United States Constitution:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

Amendment XIV of the United States Constitution:

"* * *. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

La. R.S. 14:30 (1976) defined first degree murder as

"the killing of a human being when the offender has a specific intent to kill or to commit great bodily harm."

La. R.S. 14:30.1 (1977) in pertinent part described second-degree murder as

"a homicide occurring in the course of an armed robbery . . . though the offender has no specific intent to kill or commit great bodily harm . . ."

or

"(3). The killing of a human being when the offender has a specific intent to kill, under circumstances that would be first degree murder under Article 30, but the killing is accomplished without any of the aggravating circumstances listed in Article 905.4 of the Louisiana Code of Criminal Procedure."

La. Code of Criminal Procedure Article 905.4 provides that

"The following shall be considered aggravating circumstances:

(a) the offender was engaged in the perpetration or attempted perpetration of aggravated rape, aggravated kidnapping, aggravated burglary, or armed robbery.

(b) The victim was a fireman or peace officer engaged in his lawful duties;

(c) The offender was previously convicted of an unrelated murder, aggravated rape, or aggravated kidnapping;

(d) The offender knowingly created a risk of death or great bodily harm to more than one person;

(e) The offender offered or has been offered or has given or received anything of value for the commission of the offense.

(f) The offender at the time of the commission of the offense was imprisoned after sentence for the commission of an unrelated forcible felony;

(g) The offense was committed in an especially heinous, atrocious or cruel manner."

La. C.Cr.P. art. 905.3 provides that

"A sentence of death shall not be imposed unless the jury finds beyond a reasonable doubt that at least one statutory aggravating circumstance exists and, after consideration of any mitigating circumstances, recommends that the sentence of death be imposed. The jury shall be furnished with a copy of the statutory aggravating and mitigating circumstances."

La. C.Cr.P. art. 905.9 provides that

"The Supreme Court of Louisiana shall review every sentence of death to determine if it is excessive. The court by rules shall establish such procedures as are necessary to satisfy constitutional criteria for review."

Louisiana Supreme Court Rule 28(1) provides that

"Every sentence of death shall be reviewed by this court to determine if it is excessive. In determining whether the sentence is excessive the court shall determine:

(a) whether the sentence was imposed under the influence of passion, prejudice or any other arbitrary factors, and

(b) whether the evidence supports the jury's finding of a statutory aggravating circumstance, and

(c) whether the sentence is disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant."

view, *Brady* would require that the state make an affirmative effort to obtain the requested materials on essential witnesses, if they are otherwise inaccessible to the defense.

Because of the broad and general nature of the discovery requests in this case (the defense sought rap sheets on thirteen state witnesses) and because the defense did not attempt to impeach the state's witness whose rap sheet is the focus of our present attention (Frank Wells) by asking him about prior convictions, I am not prepared to hold that the trial court's refusal to require the state to provide the defense with Frank Wells' rap sheet constitutes reversible error.

STATE of Louisiana

v.

Howard MATTHESON.

No. 80-KA-2082.

Supreme Court of Louisiana.

Nov. 16, 1981.

Rehearing Denied Jan. 25, 1982.

Defendant was convicted before the Criminal District Court, Parish of Orleans, Rudolph F. Becker, III, J., of first-degree murder and was sentenced to death, and he appealed. The Supreme Court, Marcus, J., held that: (1) under certain circumstances, trial court did not err in denying defendant's motion to quash grounded on claim that certain statute, as applied to statutory scheme of first-degree murder and second-degree murder, permitted State to introduce evidence of an aggravating circumstance during guilt-innocence phase of trial, and made the first-degree murder offense, for which he was charged, unconstitutional; (2) seizure of evidence from defendant's person was permissible as incident to lawful arrest; (3) allowance of State's challenges for cause directed at prospective jurors, who stated in advance of trial that they could not consider returning a verdict of death, was proper; (4) refusal to grant use immunity to defendant's wife, who invoked privilege against self incrimination, was proper; (5) indictment was not "written evidence" within meaning of statute providing that jury was not to have access to any written evidence; (6) prosecutor's remarks relating to appellate review of death penalty did not deprive defendant of fair trial; (7) evidence supported finding that there was the statutory aggravating circumstance consisting of defendant engaging in perpetration of armed robbery when victim was murdered; and (8) imposition of death penalty was not disproportionate to penalties imposed in other cases.

Conviction and sentence affirmed.

Lemmon, J., concurred and would assign reasons.

Calogero, J., dissented and filed opinion and together with Dennis, J., would grant a rehearing.

1. Indictment and Information ⇐137(1)

In proceeding in which defendant was convicted of first-degree murder and was sentenced to death, under certain circumstances, trial court did not err in denying defendant's motion to quash grounded on claim that statute, as applied to statutory scheme of first-degree murder and second-degree murder, permitted State to introduce evidence of an aggravating circumstance consisting of the offense being committed in especially heinous, atrocious or cruel manner, during guilt-innocence phase of trial, and made the first-degree murder offense, for which he was charged, unconstitutional. LSA-R.S. 14:30, 14:30.1, 14:30.-1, subds. A, B; LSA-C.Cr.P. arts. 905.4, 905.4(c, f, g).

2. Homicide ⇐341

In proceeding in which defendant was convicted of first-degree murder and was

sentenced to death, failure to instruct jury on statute defining second-degree murder as a murder that would otherwise be first-degree murder but was accomplished without any of the aggravating circumstances listed in certain statute did not prejudice defendant, in light of fact that the murder was accomplished while offender was engaged in statutorily listed aggravating circumstance consisting of perpetration or attempted perpetration of armed robbery. LSA–R.S. 14:30.1, subd. B; LSA–C.Cr.P. art. 905.4(a).

3. Criminal Law ⇐1178

Assignments of error which were neither briefed nor argued would be considered to have been abandoned.

4. Searches and Seizures ⇐7(1)

Search conducted without a warrant issued on probable cause is per se unreasonable, subject only to a few exceptions, including the exception for a search incident to lawful arrest made of a person in the area or in his immediate control.

5. Arrest ⇐63.4(12), 71.1(6)

Where sergeant had learned from manager of apartment that a couple fitting description of suspects in murder case resided in apartment and that he had suggested certain restaurant to couple when they inquired about a place to eat and officers observed that two persons, including defendant, were seated in the restaurant and fit description of the suspects, there was ample probable cause to arrest defendant, and, thus, seizure of evidence from his person was permissible as incident to lawful arrest.

6. Searches and Seizures ⇐7(10)

There is no constitutional prohibition against seizure of abandoned property by the police, and a search warrant is not required for seizure of such property.

7. Searches and Seizures ⇐7(10)

Evidence recovered from garbage can in restaurant's restroom, from which defendant's wife had just exited, had been abandoned, and, thus, was subject to seizure without a search warrant being required.

8. Searches and Seizures ⇐3.6(4)

Affidavit, which detailed the facts of the investigation leading to arrest of defendant and his wife and their later identification by witnesses at scene of murder and other offenses, established probable cause to justify issuance of warrant to search their apartment. LSA–C.Cr.P. art. 162.

9. Criminal Law ⇐1166.17

Even if trial judge improperly sustained State's challenges for cause to three prospective jurors in proceeding in which defendant was convicted of first-degree murder and was sentenced to death, defendant would not have been entitled to any relief, in light of fact that State used only eight of the 12 peremptory challenges allowed by law. LSA–R.S. 14:30; LSA–C.Cr.P. arts. 799, 800.

10. Criminal Law ⇐1166.17

Erroneous allowance to State of a challenge of prospective juror for cause does not afford defendant a ground for complaint, unless the effect of such ruling is exercise by State of more peremptory challenges than it is entitled to by law.

11. Jury ⇐108

In proceeding in which defendant was convicted of first-degree murder and was sentenced to death, sustaining State's challenges for cause directed at three prospective jurors was not error, in light of fact that the jurors stated that they would not consider returning a verdict of death. LSA–R.S. 14:30; LSA–C.Cr.P. art. 798(2).

12. Homicide ⇐174(1)

Defendant, who was convicted of first-degree murder and was sentenced to death, was not entitled to relief on theory that trial judge erred in allowing testimony during guilt-innocence phase of trial in regard to events occurring after murder in order to establish that murder was committed in heinous, atrocious or cruel manner, in light of fact that such evidence was not relevant to whether offense was committed in heinous manner, but, rather, was relevant to prove specific intent of defendant to kill

victim and to negate defenses of intoxication and accident. LSA–R.S. 14:30; LSA–C.Cr.P. art. 905.4(g).

13. Criminal Law ⇐363

That which forms part of res gestae is always admissible in evidence. LSA–R.S. 15:447, 15:448.

14. Criminal Law ⇐661

Accused may not exclude from jury's consideration relevant evidence concerning a crime merely by offering to stipulate.

15. Criminal Law ⇐365(3)

In proceeding in which defendant was convicted of first-degree murder and was sentenced to death, admission of evidence, which related to armed robberies that took place after the murder and were part of one continuous transaction, which was relevant to negate the defense that defendant was intoxicated and that such condition precluded presence of a specific criminal intent and which was res gestae evidence, was not error, though defendant admitted that the murder was committed in course of armed robbery. LSA–R.S. 14:30, 15:447, 15:448.

16. Witnesses ⇐2(1), 198(1)

Sixth Amendment compulsory process clause gives defendant right to bring his witnesses to court and have the witnesses' nonprivileged testimony heard, but does not carry with it the right to displace a proper claim of privilege, including the privilege against self incrimination; and such a right has not been granted by State constitutional provision. U.S.C.A.Const.Amends. 5, 6; LSA–Const.Art. 1, § 16.

17. Constitutional Law ⇐268(10)

Due process clause does not require that defense witness immunity must be ordered whenever it seems fair to grant it. U.S.C.A.Const.Amend. 14.

18. Witnesses ⇐198(1)

Though essential fairness required by Fifth Amendment guards defendant against overreaching by prosecutor and insulates defendant against prejudice, it does not create general obligations for prosecutors or courts to obtain evidence protected by lawful privileges. U.S.C.A.Const. Amend. 5.

19. Witnesses ⇐304(4)

Trial judge properly rejects a claim for defense witness immunity whenever witness for whom immunity is sought is an actual or potential target of prosecution. U.S.C.A.Const.Amends. 5, 6.

20. Witnesses ⇐304(4)

In proceeding in which defendant was convicted of first-degree murder and was sentenced to death, refusal, during either guilt-innocence or sentencing phases of trial, to grant use immunity to defendant's wife, who invoked privilege against self incrimination after being called as defense witness, was proper in view of fact that she was the subject of a pending prosecution for armed robbery and first-degree murder. LSA–R.S. 14:30; LSA–Const.Art. 1, § 16; U.S.C.A.Const.Amends. 5, 6, 14.

21. Constitutional Law ⇐268(10)

Use for impeachment purposes of defendant's silence, at time of his arrest after receiving his *Miranda* warnings, violates his due process rights. U.S.C.A.Const.Amend. 14.

22. Criminal Law ⇐1170½(3)

In proceeding in which defendant was convicted of first-degree murder and was sentenced to death, question whether defendant had made any statement to police officer at time of defendant's arrest was improper, but defendant was not prejudiced, in light of State's withdrawal of the question and the fact that no answer was given. LSA–R.S. 14:30.

23. Constitutional Law ⇐266(7)

Due process clause protects accused against conviction except on proof beyond reasonable doubt of every fact necessary to constitute the crime with which he is charged. U.S.C.A.Const.Amend. 14.

24. Criminal Law ⇐328

State cannot shift to defendant the burden of disproving an element of crime charged by use of conclusive presumption or by shifting burden of persuasion. U.S.C.A. Const.Amend. 14.

25. Criminal Law ⇐778(5)

In proceeding in which defendant was convicted of first-degree murder and was sentenced to death, instruction that "A specific intent to kill may be implied where there are no external signs of the intent beyond the mere fact of the homicide itself, if there were no just grounds for the killing, when the killing was without provocation or upon so slight a provocation as not to justify the killing" did not have the effect of shifting burden of proof to defendant to prove that he did not have requisite criminal intent. LSA–R.S. 14:30.

26. Criminal Law ⇐723(1)

In proceeding in which defendant was convicted of first-degree murder and was sentenced to death, prosecutor's remarks, in which it was urged that jury not accept the defense of no specific intent to kill and intoxication precluding the presence of specific intent because it would result in finding defendant guilty of second-degree murder rather than first-degree murder, were within scope of closing argument and did not improperly appeal to prejudice. LSA–R.S. 14:30; LSA–C.Cr.P. art. 774.

27. Criminal Law ⇐1171.1(3)

In proceeding in which defendant was convicted of first-degree murder and was sentenced to death, even if prosecutor's remarks, in which it was urged that jury not accept the defense of no specific intent to kill and intoxication precluding the presence of specific intent because it would result in finding defendant guilty of second-degree murder rather than first-degree murder, were improper, defendant would not have been entitled to relief, in light of fact that Supreme Court was not thoroughly convinced that jury was influenced by the remarks and that they contributed to the verdict. LSA–R.S. 14:30; LSA–C.Cr.P. art. 774.

28. Criminal Law ⇐858(3)

Indictment was not "written evidence" within meaning of statute providing that jury was not to have access to any written evidence. LSA–C.Cr.P. art. 793.

29. Criminal Law ⇐1174(6)

In proceeding in which defendant was convicted of first-degree murder and was sentenced to death, allowing jury to keep indictment with it during deliberation did not prejudice defendant, in light of fact that jury was instructed that indictment was a mere accusation, was not evidence of defendant's guilt, did not carry any presumption of guilt and had no probative value. LSA–R.S. 14:30; LSA–C.Cr.P. art. 793.

30. Homicide ⇐354

In proceeding in which defendant was convicted of first-degree murder and was sentenced to death, evidence in regard to defendant's prior convictions of aggravated assault and three robberies was relevant during sentencing phase of trial, irrespective of whether he placed his character at issue. LSA–R.S. 14:30; LSA–C.Cr.P. art. 905.2.

31. Homicide ⇐354

In proceeding in which defendant was convicted of first-degree murder and was sentenced to death, State was not required to affirmatively show that defendant was represented by counsel when his prior convictions occurred or had waived counsel before the prior convictions could be used to show character and propensities of defendant during sentencing phase of trial. LSA–R.S. 14:30; LSA–C.Cr.P. art. 905.2.

32. Criminal Law ⇐1177

In proceeding in which defendant was convicted of first-degree murder and was sentenced to death, admission of evidence in regard to defendant's prior convictions of aggravated assault and three robberies during sentencing phase of trial did not prejudice defendant, in view of fact that he testified that he was parole violator, that he carried sawed-off shotgun in concealed manner and was on drugs on day of homicide and that he committed armed robberies at time of killing. LSA–R.S. 14:30; LSA–C.Cr.P. art. 905.2.

33. Criminal Law ⇐713

In proceeding in which defendant was convicted of first-degree murder and was

sentenced to death, prosecutor's remarks relating to appellate review of death penalty did not deprive defendant of fair trial, in that the remarks did not indicate that jurors' responsibility was lessened by fact that their decision was reviewable and that the remarks did not contain any inaccurate or misleading information. LSA–R.S. 14:30.

34. Criminal Law ⇐1177

If jury finds more than one statutory aggravating circumstance and one is clearly supported by the record, it is unnecessary to overturn death sentence because one or more of the additional statutory aggravating circumstances are not supported. LSA–C.Cr.P. art. 905.3.

35. Homicide ⇐354

In proceeding in which defendant was convicted of first-degree murder and was sentenced to death, evidence supported finding that there was the statutory aggravating circumstance consisting of defendant engaging in perpetration of armed robbery when victim was murdered. LSA–R.S. 14:30; LSA–C.Cr.P. art. 905.4(a).

36. Criminal Law ⇐918(1)

In proceeding in which defendant was convicted of first-degree murder and was sentenced to death, denial of motion for new trial grounded on claim that State suppressed evidence, which consisted of empty vodka bottles in defendant's apartment and which would have supported his intoxication defense, was not error, in that defendant was in a position to know that such bottles were in his apartment, it did not appear that evidence was so material that it would have produced a different result and it did not appear that State had suppressed the evidence. LSA–R.S. 14:30; LSA–C.Cr.P. art. 851(3).

37. Homicide ⇐341

Defendant, who was convicted of first-degree murder and was sentenced to death, was not entitled to relief on appeal on basis of contention that trial judge erred in failing to inform jurors of the consequences if they were unable to agree unanimously on a recommendation, in that jurors were instructed that if they were unable to unanimously agree on a recommendation of death, a sentence of life imprisonment without benefit of probation, parole or suspension of sentence was the only sentence which could be imposed. LSA–R.S. 14:30.

38. Homicide ⇐354

In proceeding in which white defendant was convicted of first degree murder of white victim and was sentenced to death, there was no evidence that sentencing was imposed under influence of passion, prejudice, or any other arbitrary fact. LSA–R.S. 14:30; Supreme Court Rules, Rule 28, § 1, 8 LSA–R.S.

39. Robbery ⇐11

"Armed robbery" is the theft of anything of value from the person of another or which is in the immediate control of another, by use of force or intimidation, while armed with a dangerous weapon.

See publication Words and Phrases for other judicial constructions and definitions.

40. Homicide ⇐354

Imposition of death penalty for first-degree murder offense committed by 54-year-old defendant, who had prior convictions of aggravated assault and three robberies, engaged in aggravating circumstance consisting of perpetration of armed robberies, planned such robberies well in advance, senselessly shot a person in leg because another person refused to surrender her purse and was armed with double-barreled sawed-off shotgun, was not disproportionate to penalty imposed in other cases. LSA–R.S. 14:30; Supreme Court Rules, Rule 28, §§ 1, 4, 8 LSA–R.S.

William J. Guste, Jr., Atty. Gen., Barbara Rutledge, Asst. Atty. Gen., Harry F. Connick, Dist. Atty., Louise Korns, Nick Noriea, Jr., Dennis Waldron, John Craft, Asst. Dist. Attys., for plaintiff-appellee.

Clyde Merritt, and Dwight Doskey of Orleans Indigent Defender Program, New Orleans, for defendant-appellant.

MARCUS, Justice.

Howard Mattheson and his wife, Willene I. Mattheson, were jointly indicted by the grand jury for the first degree murder of Mamie Dupaquier on March 9, 1978, in violation of La.R.S. 14:30. The state elected to try them separately and proceeded to trial on the indictment against Howard Mattheson. After trial by jury, Howard Mattheson was found guilty as charged. A sentencing hearing was conducted before the same jury that determined the issue of guilt. The jury unanimously recommended that a sentence of death be imposed on defendant. The trial judge sentenced him to death in accordance with the recommendation of the jury. On appeal, defendant relies on seventeen assignments of error for reversal of his conviction and sentence.

FACTS

At about 4:30 p. m. on March 9, 1978, defendant and his wife entered the Hair-Wiz beauty salon on Canal Street in New Orleans where eight days earlier (March 1), defendant had had his hair washed and cut and his fingernails manicured. Defendant was armed with a double-barreled sawed-off shotgun. The first person they encountered was Mamie Dupaquier, a 75-year-old woman employed at the salon as a receptionist. Almost immediately, Ms. Dupaquier was shot in the head by defendant. The blast tore away most of her skull and brain tissue resulting in her death. According to the assistant coroner, the victim was shot at "[c]lose range, not more than a foot or two."

The rest of the 20 to 25 people in the salon were located in the main area which was situated several feet higher than the reception area. Following the shooting, defendant ran up the few stairs and commanded everyone to lie down on the floor. He informed them that he had just killed one lady and would kill again if his orders were not followed. Defendant told an employee of the salon to tape everyone's hands behind their backs. The tape was furnished to the employee by defendant. He then reloaded his gun and, with the help of his wife, began searching all of the women's purses. He stated that if he found any guns he would kill the owner with her gun. One woman refused to surrender her purse and told defendant that he would have to kill her first. Defendant responded that instead of killing her, he would shoot the woman next to her. Immediately thereafter, he shot Ms. Laura McGoey, who was lying next to the woman with the purse, in the leg.

In the midst of all this confusion, three more customers tried to enter the salon. Mrs. Mattheson let them in through the locked front door and defendant told them to give him their purses. He repeated his warning that this was not a joke, that one lady had already been killed and that he would not hesitate to kill anyone else. After collecting the money and other valuables from the purses and cash register, defendant and his wife fled the scene. Prior to their departure, defendant and his wife each ripped one of the two telephones off the wall. The couple returned to their apartment located in the vicinity where they changed their clothes before going to a nearby restaurant for dinner.

Police investigating the murder and armed robberies were informed that two people fitting the description of the Matthesons were staying in a boarding house in the vicinity. There, the police learned that the suspects had just inquired about a good place to eat in the area. The officers checked several nearby restaurants and discovered defendant and his wife seated at a table in Ponsaa's restaurant. When the plain-clothed detectives entered the restaurant, the Matthesons became suspicious and Mrs. Mattheson hurried into the restroom. At this point, defendant was arrested and searched. When Mrs. Mattheson exited the restroom, she was also arrested. A search of the restroom turned up evidence in the garbage can. Later that evening, a warrant was issued to search the Matthesons' apartment. Evidence, including the shotgun, was found as a result of that search.

At trial, defendant testified that he was intoxicated and on drugs (LSD) on the day

in question (March 9). He admitted having planned and committed the armed robberies but stated that he never intended to kill the receptionist. He further testified that Ms. Dupaquier had pulled the shotgun, as if she did not believe it was real, and it accidentally discharged. He also contended that the shooting of Ms. McGoey was accidental.

ASSIGNMENTS OF ERROR NOS. 1 AND 9

[1] Defendant contends the trial judge erred in denying his motion to quash grounded on the claim that La.Code Crim.P. art. 905.4(g) as applied to the statutory scheme of first degree murder (La.R.S. 14:30) and second degree murder (La.R.S. 14:30.1) permitted the state to introduce evidence of an aggravating circumstance, that is, the offense was committed in an especially heinous, atrocious or cruel manner, during the guilt-innocence phase of the trial. He argues that that made the offense for which he was charged, first degree murder, unconstitutional (Assignment of Error No. 1). He further contends the trial judge erred in excluding from the jury charge section B of La.R.S. 14:30.1 because it denied him the opportunity to have the jury return a second degree murder verdict under that definition (Assignment of Error No. 9).

At the time defendant committed the charged offense, the statutes of first degree murder (La.R.S. 14:30) and second degree murder (La.R.S. 14:30.1) provided as follows:

La.R.S. 14:30. First Degree Murder

First degree murder is the killing of a human being when the offender has a specific intent to kill or to inflict great bodily harm.

Whoever commits the crime of first degree murder shall be punished by death or life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence in accordance with the recommendation of the jury.

La.R.S. 14:30.1. Second Degree Murder

Second degree murder is:

A. The killing of a human being when the offender is engaged in the perpetration or attempted perpetration of aggravated rape, aggravated arson, aggravated burglary, aggravated kidnapping, aggravated escape, armed robbery, or simple robbery, even though he has no intent to kill; or

B. The killing of a human being when the offender has a specific intent to kill, under circumstances that would be first degree murder under Article 30, but the killing is accomplished without any of the aggravating circumstances listed in Article 905.4 of the Louisiana Code of Criminal Procedure.

Whoever commits the crime of second degree murder shall be imprisoned at hard labor for life and shall not be eligible for parole, probation, or suspension of sentence for a period of forty years.

Section 2. If any provision or item of this Act or the application thereof is held invalid, such invalidity shall not affect other provisions, items or applications of this Act which can be given effect without the invalid provisions, items or applications, and to this end the provisions of this Act are hereby declared severable.

Section 3. All laws or parts of laws in conflict herewith are hereby repealed.

La.Code Crim.P. art. 905.4, referred to in La.R.S. 14:30.1(B), provides:

The following shall be considered aggravating circumstances:

(a) The offender was engaged in the perpetration or attempted perpetration of aggravated rape, aggravated kidnapping, aggravated burglary, or armed robbery;

(b) The victim was a fireman or a peace officer engaged in his lawful duties;

(c) The offender was previously convicted of an unrelated murder, aggravated rape, or aggravated kidnapping;

(d) The offender knowingly created a risk of death or great bodily harm to more than one person;

(e) The offender offered or has been offered or has given or received anything of value for the commission of the offense;

(f) The offender at the time of the commission of the offense was imprisoned after sentence for the commission of an unrelated forcible felony;

(g) The offense was committed in an especially heinous, atrocious or cruel manner.

In *State v. Payton*, 361 So.2d 866 (La. 1978), decided one month after defendant's trial, we were confronted with the same contention as presented here. We held that, although section B of La.R.S. 14:30.1 had the effect of redefining first degree murder as a specific intent homicide accomplished with a statutorily prescribed aggravating circumstance, sections (c), (f) and (g) of La.Code Crim.P. art. 905.4 were to be excluded from the murder definitions so as to prevent improper considerations by the jury during the guilt-innocence phase of the trial. However, the jury was to consider all seven of the aggravating circumstances during the sentencing hearing.

In the instant case, the trial judge, faced with the dilemma presented by the aforesaid statutory scheme, chose not to include the aggravating circumstances of La.Code Crim.P. art. 905.4 in the definition of first degree murder and to exclude section B of La.R.S. 14:30.1 from the definition of second degree murder. Rather, the jury was only charged that first degree murder was "the killing of a human being with the offender has the specific intent to kill or inflict great bodily harm." This had the effect of excluding La.Code Crim.P. art. 905.4(g) from the definition of first degree murder. Moreover, the only evidence introduced at trial relating to the heinous manner in which the offense was committed was descriptions by a police officer and the assistant coroner of the victim after being shot. Their testimony indicated the shotgun blast tore away most of the victim's skull and brain tissue. This evidence was relevant to prove the specific intent of defendant by showing the close range at which the gun was fired. Photographs introduced at trial were clearly not gruesome. Under the circumstances, defendant was not prejudiced. Assignment of Error No. 1 is without merit.

[2] Defendant further contends that it was error for the trial judge to exclude section B of La.R.S. 14:30.1 from the jury charge because it denied him the opportunity to have the jury return a second degree murder verdict under that definition (Assignment of Error No. 9).

We find no substance in this contention because La.R.S. 14:30.1(B) defines second degree murder as a murder that would otherwise be first degree murder but is accomplished without any of the aggravating circumstances listed in La.Code Crim.P. art. 905.4. One of the aggravating circumstances listed in art. 905.4 provides "[t]he offender was engaged in the perpetration or attempted perpetration of ... armed robbery." La.Code Crim.P. art. 905.4(a). Defendant himself testified to the fact that he was committing an armed robbery. Hence, the jury could not properly have returned a second degree murder verdict under La.R.S. 14:30.1(B) because the killing was accomplished with one of the aggravating circumstances. Therefore, the omission of this provision from the jury charge did not prejudice defendant.[1] Assignment of Error No. 9 is without merit.

ASSIGNMENT OF ERROR NO. 2

[3] Defendant contends the trial judge erred in denying his motion to suppress physical evidence. The evidence was seized (1) from defendant as a result of being searched after his arrest at Ponsaa's restaurant, (2) from the garbage can in the restaurant's restroom after defendant's wife had exited therefrom, and (3) from the apartment where the couple was residing at the time.

This assignment of error was neither briefed nor argued; therefore, we consider it to have been abandoned. *State v. Blanton*, 325 So.2d 586 (La.1976); *State v. Carlisle*, 315 So.2d 675 (La.1975).

1. The jury was, of course, at liberty to find second degree murder under La.R.S. 14:30.1(A) had they found a killing without specific intent to do so during the perpetration of the armed robbery.

[4] In any event, it is without merit. It is well settled that a search conducted without a warrant issued upon probable cause is per se unreasonable—subject only to a few specifically established and well-delineated exceptions. *Schneckloth v. Bustamonte*, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973); *Coolidge v. New Hampshire*, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971). One of these exceptions is a search incident to a lawful arrest made of a person in the area in his immediate control. *Chimel v. California*, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969); *State v. Wichers*, 392 So.2d 419 (La.1980).

[5] At the suppression hearing, Sergeant Malcolm Cheramie testified that he had received a description of the suspects from several witnesses at the Hair-Wiz beauty salon and had learned from the manager of a nearby apartment that a couple fitting the description of the suspects resided there under the name of Mattheson. The officer further testified that the manager told him that about fifteen minutes earlier the couple inquired about a place to eat in the vicinity and he had suggested Ponsaa's restaurant. After receiving this information, Cheramie dispatched two police officers to Ponsaa's. These officers reported that individuals fitting the description of the suspects were seated at a table in Ponsaa's. We conclude that ample probable cause existed prior to the arrest of defendant. Accordingly, since the arrest was valid, the seizure of the evidence from his person was permissible as incident to a lawful arrest.

[6, 7] There is no constitutional prohibition against seizure of abandoned property by the police. *State v. Ryan*, 358 So.2d 1274 (La.1978). Nor is a search warrant required for the seizure of such property. In the instant case, the evidence recovered from the garbage can in the restaurant's restroom from which defendant's wife had just exited was clearly abandoned and thus subject to seizure.

[8] La.Code Crim.P. art. 162 provides that a search warrant may issue only upon probable cause established to the satisfaction of the judge, by the affidavit of a credible person, reciting facts establishing the cause for issuance of the warrant. In the instant case, the affidavit details the facts of the investigation leading to the arrest of defendant and his wife and their later identification by witnesses at the scene of the crimes. Clearly, the affidavit established probable cause to justify the issuance of the warrant. Therefore, the evidence seized from the Matthesons' apartment was validly obtained.

In sum, the trial judge correctly denied defendant's motion to suppress the physical evidence. Assignment of Error No. 2 is without merit.

ASSIGNMENTS OF ERROR NOS. 3 AND 4

Defendant contends the trial judge erred in overruling his objections to the allowance of the state of challenges for cause of three prospective jurors due to their sentiments regarding the death penalty. Defendant argues that the exclusion of this class of persons from the jury violates his constitutional right to be tried before a jury composed of a fair cross-section of the community.

[9, 10] The record reveals that the state used only eight of the twelve peremptory challenges allowed by law under the provisions of La.Code Crim.P. art. 799. Hence, even if we were to determine that the trial judge improperly sustained the state's challenges, defendant would be entitled to no relief. It is well settled that the erroneous allowance to the state of a challenge for cause does not afford the defendant a ground for complaint, unless the effect of such ruling is the exercise by the state of more peremptory challenges than he is entitled to by law. La.Code Crim.P. art. 800; *State v. Labostrie*, 358 So.2d 1243 (La.1978); *State v. George*, 346 So.2d 694 (La.1977); *State v. Ross*, 343 So.2d 722 (La.1977); *State v. Skelton*, 340 So.2d 256 (La.1976).

[11] In any event, there is no merit to defendant's contention. A review of the voir dire examination reveals that the ex-

cluded prospective jurors stated in advance of trial that they could not consider returning a verdict of death. Therefore, the jurors were properly excused in compliance with La.Code Crim.P. art. 798(2)[2] and *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968).[3]

There is no merit to defendant's contention that his constitutional right to be tried by a jury selected from a fair cross-section of the community has been violated when the prospective jurors have been properly excluded in compliance with La.Code Crim.P. art. 798(2) and *Witherspoon v. Illinois, supra*, as was done here. *State v. Kelly*, 375 So.2d 1344 (La.1979).

Assignments of Error Nos. 3 and 4 are without merit.

ASSIGNMENT OF ERROR NO. 5

[12] Defendant contends the trial judge erred in allowing testimony during the guilt-innocence phase of the trial of events that occurred after the murder in order to establish that the murder was committed in a heinous, atrocious or cruel manner. He argues that the purpose of the testimony concerning the armed robberies and the shooting of Ms. McGoey was to show that the aggravating circumstance of La.Code Crim.P. art. 905.4(g) was present.

There is no merit to this contention. Facts after the murder were not relevant to whether the offense was committed in an especially heinous, atrocious or cruel manner. Rather, they were relevant to prove the specific intent of defendant to kill the victim and to negate the defenses of intoxication and accident.

Assignment of Error No. 5 is without merit.

ASSIGNMENT OF ERROR NO. 6

Defendant contends the trial judge erred in allowing "excessive evidence" to show that the murder was committed in the course of an armed robbery, a fact which he willingly admitted.

This assignment of error was neither briefed nor argued; therefore, we consider it to have been abandoned. *State v. Blanton*, 325 So.2d 586 (La.1976); *State v. Carlisle*, 315 So.2d 675 (La.1975).

[13–15] In any event, it is without merit. The trial judge allowed evidence to show the armed robberies despite defendant's admission. Defendant cannot control the state's method of proof. In a criminal prosecution, the state has the burden of proving each element of the crime beyond a reasonable doubt. La.R.S. 14:30 then defined first degree murder as the killing of a human being when the offender has a specific intent to kill or to inflict great bodily harm. Evidence of defendant's conduct at the time of the murder was relevant to negate the defense that his intoxicated and drugged condition precluded the presence of a specific criminal intent. Moreover, circumstances of the armed robberies were part of one continuous transaction. Therefore, they were part of the res gestae. La.R.S. 15:448. What forms part of the res

2. La.Code Crim.P. art. 798 provides in pertinent part:

> It is good cause for challenge on the part of the state, but not on the part of the defendant, that:
>
> . . . . .
>
> (2) The juror tendered in a capital case who has conscientious scruples against the inflicting of capital punishment and makes it unmistakably clear (a) that he would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before him, or (b) that his attitude toward the death penalty would prevent him from making an impartial decision as to the defendant's guilt;

3. La.Code Crim.P. art. 798 was amended to conform with the decision in *Witherspoon*, wherein the United States Supreme Court held that "a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction. No defendant can constitutionally be put to death at the hands of a tribunal so selected." (Footnote omitted.) On the other hand, the Court found no constitutional bar to excluding jurors who stated in advance of trial that they could not even consider returning a verdict of death or that their attitude about the death penalty would prevent them from making an impartial decision as to defendant's guilt.

gestae is always admissible in evidence. La.R.S. 15:447; *State v. Matthews*, 354 So.2d 552 (La.1978). A defendant may not exclude from the jury's consideration relevant evidence concerning a crime merely by offering to stipulate. Hence, the trial judge did not err in allowing evidence of the armed robberies despite defendant's admission.

Assignment of Error No. 6 is without merit.

ASSIGNMENT OF ERROR NO. 7

Defendant contends the trial judge erred in not granting his wife, Willene I. Matthewson, use immunity when she invoked her fifth amendment privilege against self-incrimination after being called as a defense witness. He argues that his constitutional rights of compulsory process and due process were violated by the denial of his request because his wife possessed exculpatory evidence crucial to his defense.

There is no statutory authority for a Louisiana court to grant a defense witness use immunity absent a request from the attorney general together with the district attorney for the district in which the proceeding is or may be held. La.Code Crim.P. art. 439.1.[4] Therefore, any judicially-fashioned immunity must arise from the constitutional guarantees of compulsory process or due process.

Claims for defense witness use immunity have been uniformly rejected by almost all of the federal circuit courts of appeals that have considered the matter. *United States v. Turkish*, 623 F.2d 769 (2d Cir. 1980), *cert. denied*, 449 U.S. 1077, 101 S.Ct. 856, 66 L.Ed.2d 800, and cases cited therein.[5]

[16] We do not consider that the sixth amendment supports a claim for defense witness immunity. Traditionally, the sixth amendment's compulsory process clause gives defendant the right to bring his wit-

4. La.Code Crim.P. art. 439.1 provides:

A. In the case of any individual who has been or may be called to testify or provide other information at any proceeding before or ancillary to a grand jury of the state, at any proceeding before a court of this state, or in response to any subpoena by the attorney general or district attorney, the judicial district court of the district in which the proceeding is or may be held shall issue, in accordance with Subsection B of this article, upon the request of the attorney general together with the district attorney for such district, an order requiring such individual to give testimony or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination, such order to become effective as provided in Subsection C of this article.

B. The attorney general together with the district attorney may request an order under Subsection A of this article when in his judgment

(1) the testimony or other information from such individual may be necessary to the public interest; and

(2) such individual has refused or is likely to refuse to testify or provide other information on the basis of his privilege against self incrimination.

C. The witness may not refuse to comply with the order on the basis of his privilege against self incrimination, but no testimony or other information compelled under the order, or any information directly or indirectly derived from such testimony or other information, may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement or otherwise failing to comply with the order.

D. Whoever refuses to comply with an order as hereinabove provided shall be adjudged in contempt of court and punished as provided by law.

5. The only federal appellate decisions ruling in favor of defense witness immunity appear to be the Third Circuit decisions of *United States v. Morrison*, 535 F.2d 223 (3d Cir. 1976), and *Government of the Virgin Islands v. Smith*, 615 F.2d 964 (3d Cir. 1980). In *Morrison*, a divided panel of the Third Circuit reversed the conviction on the ground that prosecutorial conduct had caused a defense witness to withhold testimony out of fear of self-incrimination. As a remedy for the misconduct, the court ordered that, upon a retrial, the government faced the choice of either granting the witness use immunity or having the defendant acquitted. *Smith* did not really involve a use of the due process clause to balance the public interest in withholding immunity against the defense need of it. In *Smith*, the prosecutor with jurisdiction over the witness was willing to grant use immunity. Opposition came from a prosecutor without jurisdiction. This was simply an instance of a prosecutor interfering for no apparent reason to suppress evidence that was about to become available to the accused. Thus, we consider that *Smith* and *Morrison* are distinguishable on their facts.

ness to court and have the witness' non-privileged testimony heard, but does not carry with it the traditional right to displace a proper claim of privilege, including the privilege against self-incrimination. *United States v. Turkish, supra; United States v. Lenz*, 616 F.2d 960 (6th Cir. 1980), *cert. denied*, 447 U.S. 929, 100 S.Ct. 3028, 65 L.Ed.2d 1124. Nor has section 16 of article 1 of the Louisiana Constitution of 1974 been construed to grant such a right.

[17, 18] Additionally, we do not consider that the due process clause requires that defense witness immunity must be ordered whenever it seems fair to grant it. The essential fairness required by the fifth amendment guards the defendant against overreaching by the prosecutor and insulates him against prejudice. It does not create general obligations for prosecutors or courts to obtain evidence protected by lawful privileges. *United States v. Turkish, supra.*

[19, 20] In the instant case, the defense witness (Mrs. Mattheson) was the subject of pending prosecution for armed robbery and first degree murder. We consider that a trial judge properly rejects a claim for defense witness immunity whenever the witness for whom immunity is sought is an actual or potential target of prosecution. Hence, the trial judge correctly denied defense witness immunity in this case.

Assignment of Error No. 7 is without merit.

ASSIGNMENT OF ERROR NO. 8

Defendant contends the trial judge erred in allowing a question to whether he had made any statement to the police officer at the time of his arrest. He argues that the question constituted a prohibited comment on the exercise of his right to remain silent.

Defendant took the stand in his own behalf and testified that he had consumed about a quart of liquor and was on drugs on the day of the offense. Upon cross-examination of defendant, the following colloquy took place:

Q. At the time the police arrested you, were you still drunk, or whatever you were?

A. Yes, sir, I was—I had quite a bit. I drank some when I went home, too. After the robbery.

Q. Okay, when the police arrested you did you tell them you were intoxicated?

Defense counsel objected. The court overruled the objection, but the state withdrew the question and the answer was never given by defendant.

[21, 22] The use for impeachment purposes of defendant's silence, at the time of his arrest after receiving his *Miranda* warnings, violates his due process rights. *Doyle v. Ohio*, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976); *State v. Montoya*, 340 So.2d 557 (La.1976); *State v. Smith*, 336 So.2d 867 (La.1976). However, in *State v. Mosley*, 390 So.2d 1302 (La.1980), we found that an oblique and obscure reference to a defendant's post-arrest silence did not amount to reversible error as the defendant did not suffer any prejudice as a result thereof. In the instant case, in light of the state's withdrawal of the question and the fact that no answer was given by defendant, we cannot say that the question, albeit improper, resulted in prejudice to defendant.

Assignment of Error No. 8 is without merit.

ASSIGNMENT OF ERROR NO. 10

Defendant contends the trial judge erred in his instruction to the jury on intent. He argues that the charge impermissibly shifted the burden of proof to him to show that he lacked the requisite criminal intent.

[23, 24] The due process clause of the fourteenth amendment protects an accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged. *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). Accordingly, the state cannot shift to the defendant the burden of disproving an element of the crime charged by use of a conclusive presumption or by shifting the burden of persuasion. *Sandstrom v. Montana*, 442

U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979).[6]

[25] The issue presented is whether the challenged jury instruction had the effect of shifting the burden of proof. The instruction is as follows:

> A specific intent to kill may be implied where there are no external signs of the intent beyond the mere fact of the homicide itself, if there were no just grounds for the killing, when the killing was without provocation or upon so slight a provocation as not to justify the killing.

This instruction merely sets out a permissive inference that intent to kill *may be* implied under certain circumstances. It leaves the trier of fact free to credit or reject the inference and does not shift the burden of proof to defendant to prove he did not have the requisite criminal intent. Hence, the jury instruction concerning intent does not present a *Sandstrom* violation.

Assignment of Error No. 10 is without merit.

ASSIGNMENT OF ERROR NO. 11

[26] Defendant contends the trial judge erred in allowing the state to "overreach" during closing argument.

The prosecutor made the following remarks:

> The law of Louisiana is that if a person was so intoxicated, so drugged at the time of the commission of the offense, that it could be presumed that he could not have formed specific intent, then he can't be found guilty of first degree murder. You can only find him guilty of second degree murder. So, Number one, I didn't mean to do it, I had no intention to kill her, so find me guilty of second degree. But if you don't buy that, and you say I had specific intent, I must have wanted to kill her, well, believe that I was so drunk, so drugged, that in my mind, under the law, I couldn't have formed the specific intent. Then you've still got to find me guilty of second degree. And I can continue to do what Mrs. Dupaquier cannot continue to do: wake up each morning and draw a breath.

Defendant objected. The trial judge overruled the objection.

Defendant neither briefed nor argued this assignment of error; therefore, we consider it to have been abandoned. *State v. Blanton*, 325 So.2d 586 (La.1976); *State v. Carlisle*, 315 So.2d 675 (La.1975).

In any event, it is without merit. La. Code Crim.P. art. 774 sets forth the scope of closing argument:

> The argument shall be confined to evidence admitted, to the lack of evidence, to conclusions of fact that the state or defendant may draw therefrom, and to the law applicable to the case.
>
> The argument shall not appeal to prejudice.
>
> The state's rebuttal shall be confined to answering the argument of the defendant.

The prosecutor's remarks urged the jury not to accept the defense offered in the case (no specific intent to kill and intoxication precluding the presence of specific intent) as it would result in finding defendant guilty of second degree murder rather than first degree murder. This would allow defendant, unlike Mrs. Dupaquier, to escape with his life.

[27] We do not consider that these remarks improperly appealed to prejudice. The remarks were within the scope of closing argument. Moreover, even in the event of improper argument, we would not set aside a verdict unless we were thoroughly convinced that the jury was influenced by the remarks and that they contributed to

6. In *Sandstrom*, the United States Supreme Court held that in a case in which intent is an element of the crime charged, the jury instruction, "the law presumed that a person intends the ordinary consequences of his voluntary acts," violated the due process clause of the fourteenth amendment's requirement that the state prove every element of a criminal offense beyond a reasonable doubt because the jury could have interpreted the challenged presumption either as "conclusive" or as shifting the burden of persuasion to the defendant to show that he lacked the requisite mental state for the crime.

the verdict. *State v. Simms*, 381 So.2d 472 (La.1980). Such was clearly not the case here.

Assignment of Error No. 11 is without merit.

ASSIGNMENT OF ERROR NO. 12

Defendant contends the trial judge erred in allowing the jury to keep the indictment with it during deliberation. He argues that the very presence of such a document lent credibility to the state's case.

After the jury retired for deliberation, defendant became aware that the jury was allowed to take the indictment with it into the jury room. The trial judge refused defendant's request to have the document retrieved. Defendant's motion for a mistrial was likewise denied.

La.Code Crim.P. art. 765, in designating the normal order of trial, lists *reading of the indictment*, reading of defendant's plea on arraignment, and the opening statements of the state and of the defendant prior to the "presentation of the evidence." La.Code Crim.P. art. 793 provides that the jury shall not have access to any "written evidence." It also allows at the court's discretion the examination of any object or "document received in evidence."

[28, 29] We do not consider that an indictment is "written evidence." Hence, art. 793 does not specifically exclude it from the jury room. Even if the indictment were considered to be a "document received in evidence," the court would have discretion to permit the jury to examine it. Moreover, the jury was instructed that an indictment

> ... is a mere accusation or charge against the defendant. It is not evidence of the defendant's guilt, and the fact that ... [i]t has been filed is of no weight and does not carry any presumption of guilt, and you must not be influenced by it in considering the case. It has no probative value whatsoever.

Under the circumstances, defendant was in no way prejudiced by retention of the indictment by the jury during its deliberation.

Assignment of Error No. 12 is without merit.

ASSIGNMENT OF ERROR NO. 13

[30] Defendant contends the trial judge erred in allowing evidence of his prior convictions at the sentencing phase of the trial. He argues that the convictions were irrelevant as an anticipatory rebuttal of his good character. He argues that the documents introduced in evidence do not reveal whether or not he was represented by counsel or had waived same.

During the sentencing phase of the trial, the state introduced properly certified documents showing that defendant had been previously convicted of three robberies and an aggravated assault.[7] The documents do not reveal whether or not defendant was represented by counsel or had waived same. Defendant's objection to the introduction of the prior convictions in evidence was overruled by the trial judge.

La.Code Crim.P. art. 905.2 provides:

> The sentencing hearing shall focus on the circumstances of the offense and the character and propensities of the offender. The hearing shall be conducted according to the rules of evidence. Evidence relative to aggravating or mitigating circumstances shall be relevant irrespective of whether the defendant places his character at issue. Insofar as applicable, the procedure shall be the same as that provided for trial in the Code of Criminal Procedure. The jury may consider any evidence offered at the trial on

7. In 1952, defendant pled guilty to armed robbery and was sentenced to serve nine years in prison in Proceedings No. 554 in the district court for the County of Alfalfa, Oklahoma. In 1958, defendant pled guilty to robbery and aggravated assault and was sentenced to serve no less than twelve years nor more than fifteen years on the robbery conviction and three years on the aggravated assault conviction in Proceedings No. 22090 in the Superior Court, County of Hartford, Connecticut. In 1967, defendant was tried and convicted of robbery and sentenced to life imprisonment in Proceedings No. 67-2400 in the Criminal Court of Record, Dade County, Florida.

the issue of guilt. The defendant may testify in his own behalf. In the event of retrial the defendant's testimony shall not be admissible except for purposes of impeachment.

The above article clearly provides that the focus of the sentencing hearing is on the "character and propensities of the offender" as well as the circumstances of the offense and that evidence of "aggravating or mitigating circumstances" are relevant irrespective of whether defendant places his character at issue. Hence, there is no merit to defendant's contention that the prior convictions were irrelevant.

[31] Nor do we find any merit in defendant's related argument that the trial judge erred in permitting introduction of the prior convictions without a showing by the state that defendant was represented by counsel or had waived same. In *Lewis v. United States*, 445 U.S. 55, 100 S.Ct. 915, 63 L.Ed.2d 198 (1980), the United States Supreme Court recognized that while uncounseled felony convictions could not be used for certain purposes, the Court stated that it had "never suggested that an uncounseled conviction was invalid for all purposes." In the instant case, the prior convictions were used in the sentencing phase of the trial. The convictions were not being used to enhance punishment; rather, defendant's past criminal history was merely a part of the total picture of his "character and propensities." It did not of itself trigger added penalties. Hence, we do not consider the sentencing hearing to be one of those instances where the state is required to affirmatively show that defendant was represented by counsel or had waived same before a prior conviction may be used to show the character and propensities of the defendant.

[32] In any event, we do not consider that defendant was prejudiced in the eyes of the jury by this information in view of his own testimony during the guilt-innocence phase of the trial. He testified that he was a parole violator from Florida, that he carried a sawed-off shotgun in a concealed manner and was on drugs on the day the homicide was committed. Moreover, he candidly admitted that he had committed the armed robberies at the time of the killing. Hence, the jury was fully apprised that defendant was a law violator through his own testimony.

In sum, we conclude that the trial judge did not err in allowing introduction in evidence of defendant's prior convictions without proof by the state that defendant was represented by counsel or had waived same.

Assignment of Error No. 13 is without merit.

ASSIGNMENT OF ERROR NO. 14

Defendant contends the trial judge erred in not granting his wife use immunity during the sentencing phase of the trial.

During the sentencing phase of the trial, defendant called his wife as a witness. She invoked her privilege against self-incrimination to questions whose answers would incriminate her. As discussed in Assignment of Error No. 7, a Louisiana court has no statutory authority to grant a witness use immunity except when requested to do so by the attorney general and district attorney. Moreover, we found no constitutional requirement that a claim for defense witness immunity be granted by the court. Since we see no difference between the granting of defense witness immunity at the guilt-innocence phase and the sentencing phase of the trial, we find that the trial judge correctly denied defendant's claim for defense witness immunity.

Assignment of Error No. 14 is without merit.

ASSIGNMENT OF ERROR NO. 15

[33] Defendant contends the trial judge erred in allowing the prosecutor to refer to the fact of appellate review of the death penalty. He argues that the effect was to diminish the jury's role in the sentencing process.

In closing argument during the sentencing phase of the trial, the prosecutor stated:

> [W]hat we are now asking you to do is not put this man in the electric chair, not pull a switch—we are only asking that

you come back and recommend that the death penalty be imposed. I want to make that perfectly clear. If that recommendation is made by you twelve citizens of this city, the Supreme Court of this State will have—[Objection]

And after full scrutiny by the Supreme Court of the State, it's up to the governor of the State to sign a warrant for the death of this man. So if that's bothering anybody, that particular aspect—[Objection]

Put that aside, because the very paper that you're going to return when the judge presents it to you, the exact language, as required by law, is that "we the jury recommend" death or life. It'r a recommendation by you. Now, if your recommendation is life, that's it. That would be the sentence. If it's death, it will be subjected, as it should be, rightly so, to a complete review throughout the criminal justice system. Because as somebody else said, it's no laughing matter, and that's correct. It's the most serious matter you could ever deal with within the framework of our criminal justice system. So every possible right for that defendant up till this point and into the future are going to be closely watched, monitored, scrutinized, and protected to the utmost, as they have been up until this very moment.

Defendant objected on the ground that the argument presumed "that each of the officials of the State will do their duty on the recommendations of a jury." The objection was overruled. Later, in the state's rebuttal argument, the prosecutor stated:

Well, let me put you at ease. The Supreme Court will review this entire sentencing proceeding, and if the Supreme Court thinks that his honor has made an error, the Supreme Court will send it back for another sentencing hearing before another twelve people.

In *State v. Berry*, 391 So.2d 406 (La.1980), a similar contention was made as the one presented in this assignment of error. On application for rehearing, we stated in a per curiam that:

Any prosecutor who refers to appellate review of the death sentence treads dangerously in the area of reversible error. If the reference conveys the message that the jurors' awesome responsibility is lessened by the fact that their decision is not the final one, or if the reference contains inaccurate or misleading information, then the defendant has not had a *fair trial* in the sentencing phase, and the penalty should be vacated.

But virtually every person of age eligible for jury service knows that death penalties are reviewed on appeal. There is no absolute prohibition against references to this fact of common knowledge, and this court should not impose an absolute prohibition, since such a reference does not necessarily serve to induce a juror to disregard his responsibility. [Footnote omitted.] The issue should be determined in each individual case by viewing such a reference to appellate review in the context in which the remark was made.

In the instant case, we do not consider that the above remarks of the prosecutor conveyed the message that the jurors' responsibility was lessened by the fact that their decision was reviewable by this court. Nor did the remarks contain any inaccurate or misleading information. Hence, the remarks did not deprive defendant of a fair trial in the sentencing phase.

Assignment of Error No. 15 is without merit.

ASSIGNMENT OF ERROR NO. 16

Defendant contends the trial judge erred in imposing a sentence of death as not all three aggravating circumstances found by the jury were present.

The jury based its recommendation that a sentence of death be imposed on a finding of three aggravating circumstances: defendant was engaged in the perpetration of an armed robbery,[8] the offender knowingly created a risk of death or great bodily harm

8. La.Code Crim.P. art. 905.4(a).

to more than one person,[9] and the offense was committed in an especially heinous, atrocious or cruel manner.[10]

La.Code Crim.P. art. 905.3 provides:

> A sentence of death shall not be imposed unless the jury finds beyond a reasonable doubt that at least one statutory aggravating circumstance exists and, after consideration of any mitigating circumstances, recommends that the sentence of death be imposed. The jury shall be furnished with a copy of the statutory aggravating and mitigating circumstances.

[34] The above article has been interpreted by this court to mean that if the jury finds more than one statutory aggravating circumstance and one is clearly supported by the record, it is unnecessary to overturn the sentence because one (or more) of the additional statutory aggravating circumstances are not supported. *State v. Monroe*, 397 So.2d 1258 (La.1981); *State v. Williams*, 383 So.2d 369 (La.1980), *cert. denied*, 449 U.S. 1103, 101 S.Ct. 899, 66 L.Ed.2d 828; *State v. Martin*, 376 So.2d 300 (La.1979), *cert. denied*, 449 U.S. 998, 101 S.Ct. 540, 66 L.Ed.2d 297.

[35] In the instant case, the evidence clearly supports a finding that defendant was engaged in the perpetration of armed robbery when the victim was murdered. Defendant admitted having planned and committed the armed robberies. He also identified the shotgun used by him in the commission of the crimes. The shotgun had been recovered from his apartment after the crimes. Several victims of the robberies identified defendant as the person who had taken money and other things of value from them by use of force and intimidation while armed with a shotgun. They also identified the shotgun as the one used by defendant during the commission of the crimes.

The jury properly found that at least one statutory aggravating circumstance existed, that is, defendant was engaged in the perpetration of armed robbery when the victim was murdered; therefore, we consider it unnecessary to inquire whether the jury correctly found that the other aggravating circumstances existed.

Assignment of Error No. 16 is without merit.

ASSIGNMENT OF ERROR NO. 17

[36] Defendant contends the trial judge erred in denying his motion for a new trial grounded on a claim that the state suppressed material evidence supportive of his intoxication defense.

At the sentencing hearing, defendant made an oral motion for a new trial based "on reasons discussed in chambers." The trial judge responded: "On the errors during the trial of this matter to which objections were made." The judge noted that having "previously ruled on those matters at trial and finding no reason to change its rulings at this point, I will deny ... the oral motion for a new trial." He allowed defendant time to file a written motion. After waiving the delay provided by law, the court sentenced defendant to death in accordance with the recommendation of the jury. At a subsequent hearing to receive objections to the Uniform Capital Sentence Report, defendant moved to amend his motion for a new trial to assert that the state had knowledge of empty vodka bottles in defendant's apartment which would have been supportive of his intoxication defense. The record does not indicate that the trial judge ruled on defendant's request to amend his motion for a new trial which had previously been denied.

The record does not reveal that any written motion for a new trial was ever filed. Moreover, defendant has neither briefed nor argued this assignment of error; therefore, we consider it to have been abandoned. In any event, assuming this to be a claim for a new trial grounded on newly-discovered evidence under La.Code Crim.P.

9. *Id.*, art. 905.4(d).

10. *Id.*, art. 905.4(g).

art. 851(3),[11] it is without merit. Defendant was obviously in a position to know that there were empty vodka bottles in his apartment. At trial, he testified that he had been drinking about a quart of vodka a day for nine days prior to and including the day of the crime. He further stated that he also drank some liquor at home after the crime. Additionally, one of the photographs of defendant's apartment (S–29), admitted in evidence and viewed by the jury, prominently displays an empty liquor bottle. This photograph corroborated defendant's testimony concerning his intoxication.

Under the circumstances, we conclude that the evidence should have been discovered before or during trial. Moreover, this evidence was not so material that it would have produced a different result from the verdict reached. Finally, there is no merit to defendant's contention that the evidence was suppressed by the state. Nor can it be said that the omitted evidence would create a reasonable doubt that did not otherwise exist after evaluating the omission in the context of the entire record. *United States v. Agurs*, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976).

In sum, we conclude that the trial judge did not abuse his discretion in denying defendant's motion for a new trial.

Assignment of Error No. 17 is without merit.

SENTENCE REVIEW[12]

[37] Article 1, section 20 of the Louisiana Constitution prohibits cruel, excessive, or unusual punishment. La.Code Crim.P. art. 905.9 provides that this court shall review every sentence of death to determine if it is excessive. The criteria for review are established in La.Sup.Ct.R. 28, § 1, which provides:

> Review Guidelines. Every sentence of death shall be reviewed by this court to determine if it is excessive. In determining whether the sentence is excessive the court shall determine:
>
> (a) whether the sentence was imposed under the influence of passion, prejudice or any other arbitrary factors, and
>
> (b) whether the evidence supports the jury's finding of a statutory aggravating circumstance, and
>
> (c) whether the sentence is disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

(a) Passion, prejudice or any other arbitrary factors

[38] There is no evidence that defendant's sentence was imposed under the influence of passion, prejudice or any other arbitrary factors. Moreover, we note both defendant and his victim are white.

(b) Statutory aggravating circumstances

The jury in its verdict found the following statutory aggravating circumstances:

(1) The offender was engaged in the perpetration of an armed robbery.

11. La.Code Crim.P. art. 851(3) provides:
> The court, on motion of the defendant, shall grant a new trial whenever:
> (3) New and material evidence that, notwithstanding the exercise of reasonable diligence by the defendant, was not discovered before or during the trial, is available, and if the evidence had been introduced at the trial it would probably have changed the verdict or judgment of guilty.

12. Defendant's sentence review memorandum contains the argument, not designated as an assignment of error, that the trial judge erred in failing to inform the jurors of the consequences if they were unable to agree unanimously upon a recommendation. Relying on *State v. Williams*, 392 So.2d 619 (La.1980) (on rehearing), he urges that his sentence be reversed and the case remanded for a retrial on the issue of penalty. The record does not support defendant's contention. The jurors were instructed by the judge that if they were unable to unanimously agree on a recommendation of death, a sentence of life imprisonment without benefit of probation, parole or suspension of sentence was the "only sentence" that could be imposed. Moreover, no objection was made to this jury instruction. Also, unlike *Williams*, the jury never requested during its deliberation an instruction on the necessity of a unanimous verdict or the consequences of a non-unanimous verdict. Hence, defendant's argument is without merit.

(2) The offender knowingly created a risk of death or great bodily harm to more than one person.

(3) The offense was committed in an especially heinous, atrocious or cruel manner.

[39] Armed robbery is the theft of anything of value from the person of another or which is in the immediate control of another, by use of force or intimidation, while armed with a dangerous weapon. In our view, the evidence amply supports the jury's finding that defendant was engaged in the perpetration of an armed robbery. Accordingly, it is unnecessary for us to consider the sufficiency of the evidence for the other two statutory circumstances found by the jury.

(c) Proportionality to the penalty imposed in similar cases

[40] Supreme Court Rule 28, § 4 provides that the district attorney shall file with this court a list of each first degree murder case in the district in which sentence was imposed after January 1, 1976. The list shall include the docket number, caption, crime convicted, sentence actually imposed and a synopsis of the facts in the record concerning the crime and the defendant. In the instant case, the list reveals that there have been seventy-seven first degree murder prosecutions in Orleans Parish. Fifty-one resulted in verdicts of first degree murder. Of these fifty-one, five defendants, including Howard Mattheson, received the death penalty.[13] In twenty-six of the seventy-seven prosecutions, the murder occurred in the course of an armed robbery. Of these twenty-six, three, including Howard Mattheson, were sentenced to death. However, the youthfulness of the defendant and lack of significant prior criminal history were factors in at least seventeen cases (the other six non-death sentence cases contain no information as to age or previous crimes). Thus, in the cases most similar to defendant's, considering particularly age and prior criminal history of the defendant, the same penalty was imposed. Moreover, in the instant case, defendant planned the armed robberies well in advance of the day on which the crimes were committed. He held some 25 women captive and threatened them with death during the course of the robberies. He senselessly shot one victim in the leg because the lady next to her had refused to surrender her purse. Finally, he committed the armed robberies while armed with a double-barreled sawed-off shotgun loaded with buckshot.

According to the Uniform Capital Sentence Report, defendant is a fifty-four year old white male. His prior work record reveals that he held numerous odd jobs since the 1950's including working as a cook in 1967 and a patient care technician in 1977. The defendant has a criminal record dating back to 1942, including three armed robbery convictions. The most recent robbery conviction occurred in 1967 in Florida and the defendant received a sentence of life imprisonment. Defendant was paroled in 1977 and was a fugitive from parole supervision at the time of the murder. He has been married since 1977 but has no children. His intelligence is estimated at a medium level, with an I.Q. of 87. No psychiatric evaluation was performed in this case, though in the past the defendant has been determined to have a passive-aggresive personality disorder and was classified as a psychopathic personality.

After having considered the above factors, we are unable to conclude that the sentence imposed in the instant case is disproportionate to the penalty imposed in other cases, considering both the crime and the defendant.

DECREE

For the reasons assigned, defendant's conviction and sentence are affirmed.

13. *State v. Monroe*, 366 So.2d 1345 (La.1978); *State v. Parker*, 372 So.2d 1037 (La.1979); *State v. Culberth*, 390 So.2d 847 (La.1980); *State v. Jordan*, No. 269-824, Criminal District Court, Parish of Orleans; and *State v. Mattheson*.

CALOGERO, Justice, dissenting.

I agree with the majority disposition of the assignments of error relative to defendant's trial on the merits, with one exception: the treatment of assignment of error number 7 which brings into question whether defendant was entitled to use immunity for a defense witness. For reasons expressed hereinafter I would reserve judgment on affirming defendant's conviction until after the trial judge can conduct an evidentiary hearing concerning the testimony of the witness Willene Mattheson. That testimony, of which defendant was deprived at trial, and the substance of which is still not known, may well have affected the jury verdict in either the guilt or sentencing phases of defendant's trial.

To be successful in obtaining a conviction for first degree murder, the state had to prove, beyond a reasonable doubt, that Howard Mattheson had the specific intent to kill Ms. Dupaquier when the fatal shot was discharged. Defendant attempted to rebut the state's case by proving: (1) that he was intoxicated and on drugs at the time of the shooting and therefore could not have formed the specific intent to kill, and (2) that the shotgun accidentally discharged when Ms. Dupaquier attempted to pull the gun from him. He attempted to establish his defense with the testimony of the only live witness in the immediate vicinity of the shooting other than himself, namely, his wife Willene Mattheson. However, when Mrs. Mattheson was called to the stand as a defense witness and questioned, she refused to testify and asserted her Fifth Amendment privilege against self-incrimination, contending that her testimony might be used against her in her own pending trial for the same offense. Defendant was convicted of first degree murder and on recommendation of the jury was sentenced to death. On appeal, he asserts seventeen assignments of error, thirteen from the guilt phase and four from the sentencing phase. Among the guilt phase assignments is the contention that the trial court erred in denying him his Sixth Amendment right to present a defense by not compelling Mrs. Mattheson to testify where she was the only witness able to support Mattheson's defense.

The following facts were adduced at trial. On March 9, 1978, at approximately 4:30 p. m. defendant and his wife entered the Hair Wiz beauty salon. Defendant was armed with a double barrel sawed-off shotgun. There were twenty to twenty-five people in the salon when defendant and his wife entered. Defendant first encountered the salon receptionist, a Ms. Mamie Dupaquier. A shot was fired from defendant's shotgun, whether accidentally or intentionally, killing Ms. Dupaquier. She died several hours later in Charity Hospital.

Following the shooting, defendant ordered everyone in the salon to get on the floor, threatening to blow their heads off if they did not follow his orders. He had one of the employees tape everyone's hands together and he and his wife went through all of the women's purses. When one woman refused to give up her purse telling the defendant he would have to kill her first, defendant replied that he would not kill her but would instead shoot the woman next to her. At that moment another shot was fired, striking a Ms. McGoey in the leg. After collecting all the valuables and cash from the purses and cash register, defendant and his wife left the salon. They were arrested later that day in Ponsaa's Mid-City Restaurant located a short distance from the beauty salon.

Defendant took the stand in his own defense and asserted that on the day of the crime he had consumed one and one-half quarts of liquor and a tab of L.S.D. He admitted that he entered the salon armed with the shotgun but asserted that he had no intention of committing murder. He stated that he only intended to rob the salon and its patrons. Defendant testified that Ms. Dupaquier pulled on the shotgun, causing it to discharge accidentally. Defendant further testified that the shooting of Ms. McGoey in the leg was also accidental.

After a guilty verdict was returned and the sentencing phase of the trial completed,

the jury returned a recommendation for the death penalty. Of the guilt phase assignments, I consider all but one to be without merit. With respect to assignment of error number 7, for the reasons I give hereinafter, I would remand for an evidentiary hearing.

ASSIGNMENT OF ERROR NO. 7

Defendant's assignment of error number 7 concerns the refusal of the trial court to grant use immunity[1] to his wife Willene Mattheson so that she could testify in his defense without fear that her testimony would be used against her in her then pending trials for armed robbery and first degree murder growing out of the same events which formed the basis for the charges against defendant.

The importance of the testimony of Mrs. Mattheson to defendant's case can best be illustrated by a recitation of facts regarding the incident. Among the state's witnesses during its case-in-chief were eight women who were in the Hair Wiz at the time Ms. Dupaquier was shot. Most of these women, however, did not see the shooting or the events leading up to the shooting. All but one of them testified that they first became aware of the problem by hearing a loud noise or explosion. Two of the women said that they saw the victim fall after their attention was drawn to the reception area by the noise. One woman did state that she was looking in the direction of the reception area at the time of the shooting. Her testimony, however, does not relate any sequence of events which preceded the shooting. Rather, she said that she saw the events "all together." In response to the questioning by the prosecutor, the witness replied that she did not see Ms. Dupaquier lunge at defendant or move at any time prior to being shot. The state also called as a rebuttal witness another woman who saw the shooting. This witness testified that she did not see Ms. Dupaquier grab the gun and the victim was not moving at the time of the shooting. On cross-examination, this witness admitted that her attention was more on defendant than on the victim.

There is no testimony regarding where this last witness was in relation to the immediate vicinity of the shooting. According to the witnesses who were in the beauty shop, the working area is located up a few steps from the level at which the receptionist was working. Consequently, people on the upper level might have a distorted or incomplete view of what occurs on the lower level. The earlier witness who testified that the victim did not grab the gun was on this upper level giving a customer a permanent wave when the victim was killed.

Defendant's wife was at his side at the time Ms. Dupaquier was shot. In this position she would be the person best able to observe the sequence of events which culminated in the shooting. Furthermore, she was with defendant before he entered the Hair Wiz and would know whether and the extent to which he was intoxicated and any other matters possibly pertinent to defendant's preconceived plan concerning the armed robbery. Defendant called her as a witness.

Mrs. Mattheson gave her name and said that she was the wife of the defendant. When asked whether she was with defendant on March 9, 1978, Mrs. Mattheson conferred with her attorney and then replied: "Under the advice of my attorney, I take the Fifth Amendment." Following a few more questions which the witness refused to answer under the protection of the Fifth Amendment, defense counsel asked that the jury be excused so that he might argue defendant's Sixth Amendment rights to the judge.

The jury was removed from the courtroom and defense counsel suggested that the court provide use immunity for Mrs. Mattheson so that whatever testimony she gave could not be used against her during her forthcoming trials. When the judge refused, defense counsel called Mrs.

1. A witness granted use immunity is only immune from the use of the compelled testimony or information derived from that testimony. The witness is not immune from prosecution or the use of evidence other than the compelled testimony or its derivatives.

Mattheson's attorney to the stand (still out of the presence of the jury). Mrs. Mattheson's attorney was asked whether it was his opinion "as an attorney that the testimony that Mrs. Mattheson would give to the Court in reference to whether or not there was an intent, a preconceived design to kill Mrs. Mamie Dupaquier, would be exculpatory as to her husband?" The attorney responded that such was his opinion and that he had in the past characterized the testimony as "critical."

Defense counsel asked the witness' attorney whether it was not true that Mrs. Mattheson wished to testify but was invoking the Fifth Amendment only on his advice. Mrs. Mattheson waived the attorney-client privilege so that her attorney could answer this question. Following the waiver, the attorney answered that initially Mrs. Mattheson had said that she did not want to testify, but that "later she changed her mind and became indecisive." At no time, however, did Mrs. Mattheson express an affirmative desire to testify, according to the attorney.

Sometime after this defendant's trial, Willene Mattheson was tried on seven counts of armed robbery arising out of the same incident and was acquitted on all counts. On September 15, 1978, a little over three months after the conviction of Howard Mattheson for first degree murder, after failing to convict Mrs. Mattheson on the armed robbery charges, the state nolle prossequied the first degree murder charge against her.

At sentencing, defense counsel made an oral motion for new trial incorporating the same allegations upon which "bills of exceptions" were preserved during the trial. The record does not indicate whether the oral motion was followed with a written one. Nevertheless, the trial judge stated that he had already ruled on those matters at trial and found no reason to change the rulings. He therefore denied the motion for a new trial.

Article 439.1 of the Code of Criminal Procedure, relative to the authority to compel testimony from a witness, provides in effect that the *Attorney General* or *district attorney* may by subpoena initiate proceedings and secure a court order directing a given witness to give testimony upon that witness' being afforded immunity from the use by the state thereafter of such testimony or information directly or indirectly derived from such testimony, notwithstanding the witness' attempt to invoke the Fifth Amendment.[2]

Justice Lemmon, concurring in *State v. Bice*, 390 So.2d 1270, 1272 (La.1980), pre-

2. Code of Criminal Procedure Article 439.1 provides:

A. In the case of any individual who has been or may be called to testify or provide other information at any proceeding before or ancillary to a grand jury of the state, at any proceeding before a court of this state, or in response to any subpoena by the attorney general or district attorney, the judicial district court of the district in which the proceedings is or may be held shall issue, in accordance with Subsection B of this article, upon the request of the attorney general together with the district attorney for such district, an order requiring such individual to give testimony or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination, such order to become effective as provided in Subsection C of this article.

B. The attorney general together with the district attorney may request an order under Subsection A of this article when in his judgment

(1) the testimony or other information from such individual may be necessary to the public interest; and

(2) such individual has refused or is likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination.

C. The witness may not refuse to comply with the order on the basis of his privilege against self-incrimination, but no testimony or other information compelled under the order, or any information directly or indirectly derived from such testimony or other information, may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement or otherwise failing to comply with the order.

D. Whoever refuses to comply with an order as hereinabove provided shall be adjudged in contempt of court and punished as provided by law.

dicted that "this court will eventually be faced with the question of judicial authority to grant immunity to defense witnesses..." In my opinion, that case is this one, involving a jury recommendation of a death sentence. There could hardly be a more important case in which to consider the issue of immunity for a defense witness, a defendant's right to call witnesses, and due process.

The concept of judicially fashioned use immunity to enable a witness to testify *for* the defense is not without precedent, although until now this Court has never ruled on the issue. While there are admittedly those cases cited by the majority in which the court rejected the idea of immunity for a defense witness, I do not consider those cases dispositive as far as federal jurisprudence is concerned.

In any event, the United States Court of Appeals for the Third Circuit has held that there are situations in which due process requires that a defendant request and receive use immunity for a witness whose testimony will be exculpatory to the defendant, but might be incriminating to the witness. In *Government of Virgin Islands v. Smith*, 615 F.2d 964 (3rd Cir. 1980), that court remanded the case to the district court with instructions to determine whether deliberate prosecutorial misconduct had occurred in the government's refusal to request use immunity for a witness who supposedly had information which would exculpate certain of the defendants. If the lower court were to determine that the prosecutor had not behaved arbitrarily in refusing to request use immunity for the witness, the district court was instructed to use a balancing test to determine whether due process still might mandate a grant of use immunity to the witness.

The procedure established by *Smith* is that the defendant must apply to the trial court for use immunity naming the proposed witness and specifying the particulars of the witness' testimony. The witness must be available to testify and the defendant must make a convincing showing that the testimony will be clearly exculpatory and is essential to defendant's presentation of his case. Consequently, testimony that is merely cumulative will not qualify the witness for use immunity. Once defendant has made the threshold showing above, the court's focus shifts to a consideration of the countervailing interest of the state in not having use immunity granted to the proposed witness.

Smith presented a rather unusual situation. The witness for whom use immunity was sought was a juvenile under the exclusive jurisdiction of the juvenile authorities who were willing to grant use immunity to him. The juvenile authorities, out of prosecutorial courtesy, however, requested that the United States Attorney consent to the grant of use immunity, and that official for unexplained reasons did not concur. The proposed witness had made a statement to the police which inculpated himself in the crime and identified his co-perpetrators by nicknames which were not the nicknames by which three of the *Smith* defendants were known, rather, presumably, the nicknames of persons other than the three defendants. The testimony, therefore, was clearly exculpatory. The witness was an eyewitness to the crime and the court stated that "it would be difficult to argue that [his] eyewitness testimony ... would not be essential to the defense case." 615 F.2d at 974. The court noted that the United States Attorney could have little interest in opposing a grant of use immunity because that official had no jurisdiction to prosecute the witness.

The *Smith* court summarized the theories under which due process requires use immunity for a defense witness:

> When the court finds prosecutorial misconduct by the government's deliberate intent to disrupt the fact finding process, it should order the government to grant statutory immunity to the defense witness or face a judgment of acquittal. In addition, even if there is no evidence of such prosecutorial misconduct, when it is found that a potential defense witness can offer testimony which is clearly exculpatory and essential to the defense

case and when the government has no strong interest in withholding use immunity, the court should grant judicial immunity to the witness in order to vindicate the defendant's constitutional right to a fair trial. 615 F.2d at 974.

The Third Circuit based its holding upon cases by the United States Supreme Court which stress a defendant's due process right to present a defense. Among these cases is *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), which holds that the government may not suppress exculpatory materials not known to the defendant. Suppression of such evidence violates a defendant's constitutional rights and requires a new trial when the evidence is such that it creates a reasonable doubt that did not otherwise exist. *United States v. Agurs*, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976).

The United States Supreme Court pioneered the concept of judicially initiated use immunity in *Simmons v. United States*, 390 U.S. 377, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968), within the context of a defendant's Fourth Amendment right to be free from unreasonable search and seizure. The *Simmons* court held that an accused who admits ownership of property so that he may have standing to challenge its admissibility may not have his admission of ownership used against him during the guilt-phase of his trial. The Court found it "intolerable that one constitutional right should have to be surrendered in order to assert another." 390 U.S. at 393, 88 S.Ct. at 976.

Admittedly, *Simmons* does not address the situation before us where the constitutional rights being asserted are held by different individuals. However, I believe that it is necessary to accommodate the constitutional rights of both individuals, the defendant and his right to compulsory process, and the witness and his right to invoke the Fifth Amendment. A defendant's right to compulsory process is an empty one if a witness is permitted to invoke the protection of the Fifth Amendment and refuse to testify.

My reading of the record does not establish that the prosecutor's not granting statutory use immunity[3] was a prosecutorial abuse of discretion. It is and should remain the prerogative of the prosecutor to try co-participants in a crime in whichever order he chooses. However, he should not so fix the order of trial and not grant use immunity when use immunity is clearly required to assure a defendant's constitutional right to present a defense.

The grand jury charged defendant and his wife in a single indictment and pretrial proceedings were had jointly. Just over a month before trial, Willene Mattheson filed a motion to sever the trials and the trial court denied the motion two weeks before trial was scheduled to begin. The day before the scheduled trial, counsel for Mrs. Mattheson moved for a continuance because he was previously committed to a jury trial in federal court. At this point, the state severed the trials so as not to delay the trial against this defendant. Nothing about the order of trying defendant and his wife, the apparent seriousness of the charges against Willene Mattheson, or the status of the prosecutor's knowledge of her proposed testimony and its possible value to defendant suggests, nor do I imply, prosecutorial misconduct.

However, prosecutorial misconduct is not the only situation which should trigger a grant of judicially-fashioned use immunity for a defense witness. I agree with the United States Third Circuit Court of Appeals that there are occasions which require such immunity to enable a defendant to realize his due process right to present a defense. The balancing test proposed by that court in *Smith* is an excellent method for allowing both the witness and the defendant to assert their respective constitutional rights. The test as outlined by the

3. While there is not on the record an indication that defendant requested the prosecutor to grant use immunity to the potential defense witness, the prosecutor's silence, and his not acquiescing in defendant's request to the judge, makes it evident that he did not choose to grant statutory use immunity.

federal court contains safeguards for both the witness who seeks to invoke the Fifth Amendment and the defendant who wishes to present exculpatory evidence via the testimony of that witness.

When a defendant wishes to have use immunity granted to a potential witness in his behalf, I would have him apply to the trial court naming the witness and specifying that the witness will be available. The defendant would have to make a convincing showing that the testimony of the witness would be clearly exculpatory and essential to the presentation of the defense case. The trial court would then have to determine whether indeed the witness would offer testimony which would be clearly exculpatory and essential to the defendant's presentation of his defense. If the court made the foregoing determinations in the affirmative, the court would then examine whether there were strong governmental interests which would countervail a grant of use immunity. I recognize that application of the procedure I propose would necessarily result in ad hoc determinations whether to grant or withhold use immunity for a potential defense witness. Nevertheless, I believe that due process requires guidelines for the proper consideration of a defendant's request.

The above procedure, of course, could not be given retrospective effect. In the case at bar, I would have us determine whether the effect of denying this defendant's request to compel the testimony of Willene Mattheson violated defendant's right to compulsory process. That determination would be hindered in the trial under review because the trial judge did not then have the benefit of the procedure I propose. Additionally, a post-trial evaluation of whether defendant was indeed seriously prejudiced is hampered by the fact that the nature of the proposed testimony is nowhere to be found in this record other than the conclusionary statements of Mrs. Mattheson's attorney that her testimony was clearly exculpatory and critical. Finally, now that she has been acquitted of armed robbery and the state has nolle prossequied the first degree murder charge against her, there can be no strong countervailing interest of the state which would weigh against a grant of use immunity to Mrs. Mattheson. Even if the witness can still be prosecuted for first degree murder on reinstituted charges, I am still of the view that the state's interest in avoiding the grant of use immunity to Mrs. Mattheson at her husband's trial is not great enough to offset this defendant's right to try to show that his conviction and death sentence were secured in violation of his Sixth Amendment right to present a defense by calling this witness in his behalf. This is a case in which the state sought and the jury recommended a sentence of death. If use immunity is granted, the state loses only the right to use against the witness in a later prosecution the inculpatory admissions and derivatives thereof, evidentiary matters of which the state does not have the benefit absent the witness giving the compelled testimony. I therefore would grant use immunity to Willene Mattheson so that she could testify at an evidentiary hearing, which I would order, on defendant's motion for a new trial.

Because the present record does not allow an intelligent assessment of whether the testimony of Mrs. Mattheson would be vital to the presentation of defendant's case, I would direct the trial court to hold an evidentiary hearing at which testimony would be taken from Willene Mattheson under a grant of use immunity. Should Mrs. Mattheson not be available to testify at the evidentiary hearing, her attorney could state, under this grant of use immunity for his client, what he understands her testimony would be if she were personally to testify. After such hearing, I would have the trial court determine whether due process requires that defendant be granted a new trial. In making this determination, the trial court would decide whether the testimony of Mrs. Mattheson is "material" in the sense that that word is used in *Agurs, supra*. In other words, I would have the trial judge order a new trial if he determined that had the testimony of Mrs. Mattheson been presented at defendant's

trial there would have been created a reasonable doubt about defendant's guilt which did not otherwise exist. Needless to say, that ruling would be subject to review anew by this Court.

In summary, I would remand the case to the trial court for an evidentiary hearing on defendant's new trial motion. At that hearing, Willene Mattheson (or her attorney should Mrs. Mattheson be unavailable) would testify under a grant of use immunity. Following the hearing the trial judge would determine whether the testimony of Mrs. Mattheson was such that it created a reasonable doubt about defendant's guilt which did not exist without the testimony. If the trial judge determines that Mrs. Mattheson's testimony created such a doubt, I would have him order a new trial for defendant. I would reserve to defendant the right to seek review of an adverse ruling.

The majority has determined that defendant's right to a fair trial and right to call witnesses is subordinate to the witness' invocation of the Fifth Amendment. They have made this determination in a case in which defendant has had the death penalty recommended and notwithstanding that we can, even at this point in time, ascertain whether defendant's constitutional right to present a defense, and due process, have been prejudicially denied him, all without any real offense to the witness' Fifth Amendment privilege: by way of the procedure suggested in the discussion above.

For these reasons, I respectfully dissent.

STATE of Louisiana

v.

Paul M. KROLOWITZ.

No. 81-KA-0374.

Supreme Court of Louisiana.

Nov. 16, 1981.

Rehearing Denied Jan. 25, 1982.

Defendant was convicted in the Thirty-Fourth Judicial District Court, Parish of St. Bernard, Richard H. Gauthier, J., of armed robbery, and he appealed. The Supreme Court, Watkins, J. ad hoc, held that: (1) affidavit for issuance of search warrant, when unintentional misstatements by affiant officers were excised, set forth probable cause for issuance of warrant to obtain revolver in defendant's trailer; (2) statements of victim fell within excited utterance exception to hearsay rule; (3) matters of connexity of red handkerchief and stack of coins taken from alleged coperpetrator were for the jury; and (4) trial court did not err in instructing jury on law concerning principles.

Affirmed.

Dixon, C. J., dissented from treatment of hearsay issues.

1. Searches and Seizures ⇐3.6(1)

If unintentional misstatements are made by affiants seeking to obtain search warrant, these misstatements must be excised and remainder used to determine whether or not affidavit sets forth probable cause for issuance of warrant.

2. Searches and Seizures ⇐3.6(5)

Affidavit for issuance of search warrant, when unintentional misstatements by affiant officers were excised, set forth probable cause for issuance of warrant to obtain revolver in defendant's trailer.

3. Searches and Seizures ⇐3.6(3)

Hearsay may be used as basis for issuance of search warrant, if there are corroborating circumstances of which affiants have personal knowledge.

APPENDIX C
SUPREME COURT OF LOUISIANA

NO. 80-KA-2082

ORIGINAL.

ORIGINAL

STATE OF LOUISIANA

V.

HOWARD MATTHESON

APPLICATION FOR STAY OF PROCEEDINGS

Now into Court comes the defendant, through his undersigned attorney, and respectfully requests that the Court stay all proceedings in this matter until the Supreme Court of the United States can rule on a petition for a writ of certiorari to be filed. In support of this application, defendant gives notice that he has been sentenced to death, and that this sentence has been affirmed by this Honorable Court. The application for a rehearing was denied on January 25, 1982, and the defendant has sixty days from that date to file his petition before the United States Supreme Court. Given the inevitable delays in processing such an application, the ninety days in which the judge must set the execution will surely have passed before a ruling by the Supreme Court.

Defendant accordingly requests that the Court stay all proceedings in this matter until the Supreme Court of the United States rules on the petition for certiorari. Defendant realizes that any stay will be conditioned upon timely filing of the application.

Respectfully submitted,

SUPREME COURT OF LOUISIANA
FILED FEB 1 1982
CLERK

DELIVERED BY HAND

Dwight Doskey
2700 Tulane Avenue, Room 112
New Orleans, La. 70119

ORDER

Considering the foregoing, all proceedings in this matter are stayed pending timely filing and disposition by the United

States Supreme Court of a petition for a writ of certiorari.

New Orleans, Louisiana, this 2nd day of February 1982.

JUSTICE

CERTIFICATE

I hereby certify that a copy of the foregoing application for a stay has been served on the assistant district attorney by hand delivery on this 29th day of January, 1982.

Dwight Doskey

APPENDIX D

SUPREME COURT OF THE UNITED STATES

HOWARD MATTHESON, Petitioner,

v.

STATE OF LOUISIANA, Respondent

Motion to Proceed in Forma Pauperis

Now into Court comes the petitioner, Howard Mattheson, through his undersigned counsel, and moves the Court to allow him to proceed in forma pauperis in this matter. Petitioner has had appointed or volunteer counsel since his arrest, as he has been unable to pay for representation. By the attached affidavit, petitioner attests to his poverty and his inability to pay for the costs of these proceedings.

Respectfully submitted,

_____

Dwight Doskey
Counsel for Petitioner
Orleans Indigent Defender Program
New Orleans, La. 70119
Tel.: (504) 821-8101

O R D E R

In view of the above motion and the supporting affidavit, it is hereby ordered that petitioner Howard Mattheson be allowed to proceed in forma pauperis in this matter.

Washington, D.C., this _____ day of _____, 1982.

_____

J U S T I C E

SUPREME COURT OF THE UNITED STATES

HOWARD MATTHESON

versus

STATE OF LOUISIANA

Affidavit in Support of Motion to Proceed on Certiorari in Forma Pauperis

I, Howard Mattheson, being first duly sworn, depose and say that I am the petitioner in the above-entitled case; that in support of my motion to proceed on certiorari without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding ro to give security therefor; that I believe I am entitled to redress, and that the issues which I desire to present on certiorari include those in the accompanying petition.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the petition for certiorari are true.

1. I am not presently employed, but my last employment was terminated on Feb. 25, 1978, when I was working for Rickery Hospital, New Port Fla and receiving $125.0 as salary.

2. I have not received any income in the form of rent payments, interests, or dividends within the past twelve months.

3. I own no checking or savings account, and have only n/a dollars in cash.

4. I own no real estate, stocks, bonds, notes, automobiles or other valuable property.

5. No one is dependent upon me for support.

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Howard Mattheson

Howard Mattheson

Subscribed and sworn to before me on this 26 day of Feb, 1982.

Kendall Coody

NOTARY PUBLIC

CERTIFICATE OF SERVICE

I hereby certify that I have accompanied counsel of record to the United States Post Office in New Orleans, Louisiana, where he is depositing copies of this petition for certiorari, and the motion and affidavit to proceed in forma pauperis, correctly addressed and first class postage prepaid, for the United States Supreme Court and for opposing counsel.

New Orleans, Louisiana, this 26th day of March, 1982.

Milton P. Masinter

Milton P. Masinter
2549 Banks Street
New Orleans, La. 70119
Member of the Supreme Court Bar

Sworn to and subscribed before me this 26th day of March, 1982.

Milton P. Masinter

NOTARY PUBLIC